TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903. 1903

No. 422. 407

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE ST. ANTHONY RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

FILED [illegible]

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 479.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE ST. ANTHONY RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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A

No. 731.

In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,
vs.
THE ST. ANTHONY RAILROAD COMPANY.

TRANSCRIPT OF RECORD.

Error to the United States circuit court for the district of Idaho, southern division.

1 In the circuit court of the United States within and for the district of Idaho, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Complaint.

The United States of America, by R. V. Cozier, its attorney for the district of Idaho, complains of the St. Anthony Railroad Company, a corporation, the defendant above named, for that during all the times hereinafter mentioned the plaintiff was, and now is, the owner and in the possession of the following-described lands situated in said district of Idaho, to wit:

Which will be, when surveyed, townships nine (9), ranges 42, 43, and 44 E. B. M.; townships eighteen (18), ranges 41, 42, 43, and 44, all in Fremont County, Idaho; and townships 2 and 3 N., R. 42 E. B. M., in Bingham County, Idaho, Blackfoot land district.

And for that during the summer and fall of the year 1899 the defendant, being now, and being then, a corporation organized and existing under and by virtue of the laws of the State of Idaho and carrying on a railroad business in said State, unlawfully entered upon said lands, through its authorized representatives, and felled and cut down timber and trees then and there growing and being upon the lands aforesaid, and wilfully took and carried away of the trees and timber so felled and cut, and belonging to the plaintiff, and converted to its, the said
2 defendants, own use 1,702,000 feet thereof, then and there of the value of $12.35 per 1,000 feet, or $21,019.70 in all.

And for that during all the times hereinafter mentioned the plaintiff was, and now is, the owner and in the possession of the following-described lands situated in the district of Idaho, to wit, which will be when surveyed townships nine (9), ranges 42, 43, and 44 E. B. M.; townships eighteen (18), ranges 41, 42, 43, and 44, all in Fremont County, Idaho; and townships 2 and 3 N., R. 42 E. B. M., in Bingham County, Idaho, Blackfoot land district.

And for that during the summer and fall of the year 1899 the defendant, being then, and now, a corporation organized and existing under and by virtue of the laws of Idaho, engaged in conducting a general railroad

business in said State, through its authorized representatives, unlawfully entered upon said lands and felled and cut down timber and trees then growing and being upon said lands aforesaid, and wilfully took and carried away of the trees and timber so felled and cut, and then the property of the plaintiff, and converted to its, the said corporation aforesaid, own use 225,000 feet of by-product of lumber manufactured therefrom, then and there of the value of $2.00 per 1,000 feet, or $450.00 in all.

Wherefore, the said United States demands judgment against the said defendant, the St. Anthony Railroad Company, in the sum of $21,469.70, with legal interest from date of conversion, and costs of suit.

R. V. COZIER,
United States Attorney for Idaho, and Attorney for Plaintiff.

3 UNITED STATES OF AMERICA,
District of Idaho, ss:

R. V. Cozier, being duly sworn, says that he is United States district attorney for Idaho and attorney for plaintiff in the above-entitled action; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated upon his information and belief, and as to those matters he believes it to be true.

R. V. COZIER.

Subscribed and sworn to before me this 21st day of August, A. D. 1900.

[SEAL.]

A. L. RICHARDSON,
Clerk U. S. Circuit Court.
By M. COZIER, *Deputy.*

(Endorsed:) No. 63. In the circuit court of the United States within and for the district of Idaho, southern division. United States of America, plaintiff, vs. St. Anthony Railroad Company, defendant. Complaint. Filed August 24th, 1900. A. L. Richardson, clerk. R. V. Cozier, United States attorney for Idaho and attorney for plaintiff.

In the circuit court of the United States for the district of Idaho, southern division.

UNITED STATES OF AMERICA
vs.
ST. ANTHONY RAILROAD COMPANY.

4 *Summons.*

The President of the United States to St. Anthony Railroad Company, the above-named defendant, greeting:

You are hereby commanded to be and appear in the above-entitled court, holden at Pocatello, in said district, and answer the complaint filed against you in the above-entitled action within twenty days from the date of the service of this summons upon you, if served within the county of Bannock, in said district, or if served within any other county of said

district, then within forty days from the date of such service upon you; and if you fail so to appear and answer, for want thereof, the plaintiff will take judgment against you for the sum of $21,469.70, together with legal interest and costs of suit. This suit is brought upon the ground that you, said defendant, entered upon certain lands of plaintiff situated in Fremont County, Idaho, unlawfully and felled and converted to your own use timber trees to the value aforesaid. The facts more fully appearing in plaintiff's complaint, a certified copy of which is hereto annexed and made a part hereof.

And this is to command you, the marshal of said district, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, affixed at Boise City, in said district, this 24th day of August, 1900.

[SEAL.] A. L. RICHARDSON, *Clerk.*

5 (Endorsed:) No. 63. In the circuit court of the United States for the district of Idaho, southern division. United States of America vs. St. Anthony Railroad Company. Summons. Returned and filed January 22d, 1901. A. L. Richardson, clerk.

In the circuit court of the United States within and for the district of Idaho, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Answer.

Comes now the defendant and answers the plaintiff's complaint, as follows, to wit:

(1)

It admits the incorporation of the defendant and the ownership of the lands described in the complaint, substantially as therein alleged.

(2)

Defendant denies that during the summer or fall of the year 1899, or at any other time, it unlawfully entered upon the lands mentioned in the complaint or upon any part thereof, through its authorized representatives, or otherwise or at all, or unlawfully felled or cut down any timber or trees then growing or being thereon, or wilfully took or carried away any of the said alleged trees or timber, or any trees or tim-

6 ber, or wilfully converted to the defendant's use 1,702,000 feet or 225,000 feet thereof, or any amount at all, and denies that defendant cut or felled or caused to be cut or felled, or appropriated, or converted to its use any trees or timber of any amount or value, except as hereinafter expressly admitted.

For a further and affirmative defense defendant avers:

(1)

That the defendant was, on or about May 18th, 1899, duly incorporated under and pursuant to the laws of the State of Idaho, for the purpose of constructing, owning, maintaining, and operating a steam railroad, extending from the town of Idaho Falls in Bingham County, Idaho, to St. Anthony in Fremont County in said State, a distance of approximately forty miles.

(2)

That on or about July 7th, 1899, the board of directors of the defendant company adopted as the route for said railway the line then surveyed and located by the defendant's engineer and shown upon the maps then presented, which line or right of way is the same as that upon which defendant's said railroad was afterwards actually built and upon which the same is now actually maintained and operated and is practically a straight line between said town of Idaho Falls and said town of S Anthony. That said right of way so surveyed, adopted, occupied, and used, passed and passes through and over public lands of the United States, and on or about July 7th, 1899, defendant caused to be filed in the local land office at Blackfoot, Idaho, a copy of its articles of incorporation, and due proofs of its organization under the same; also
7 maps of said right of way, together with certificates and affidavits in due form as required by law and the rules and regulations of the General Land Office, all of which papers and maps were thereafter forwarded to and filed with the Secretary of the Interior at Washington, D. C., on or about July 19th, 1899, and by him approved October 4th, 1899, and that defendant fully and duly performed all things required of railroad companies by the act of Congress granting to railroads the right of way through the public lands of the United States, approved March 3d, 1875, and thereby became entitled to the benefits and privileges therein granted to railroad companies.

(3)

And defendant avers that for the purpose of procuring the necessary material with which to construct its said railroad from Idaho Falls to St. Anthony, defendant entered into a contract with the Thompson Mercantile Company, a corporation, of St. Anthony, Idaho, by the terms and conditions of which the said Thompson Mercantile Company was to furnish to defendant at the times and in the manner therein agreed upon, and for the consideration therein named, ties and timbers of dimensions suitable for the construction of said railroad and as specified in said contract. That said ties and timbers were to be used and were used solely for the purpose of the original construction of said railroad, and said Thompson Mercantile Company was by the express terms of said contract appointed as the agent of the defendant, and in that capacity was authorized to cut timber for said and no other purpose upon and to take the same from the public lands of the United States adjacent to the line of said railroad.

8 (4)

That, as defendant is informed and believes and therefore avers, pursuant to the terms of said contract and acting as the agent of defendant, said Thompson Mercantile Company did enter upon the lands described in the complaint, the same being adjacent to the line of said railroad, for the purpose of procuring said ties and timbers, and did during the summer and fall of 1899 cut and remove of the trees and timber growing upon said lands not to exceed 1,682,975 feet thereof, and did deliver the same to this defendant along the line of its said road, to be, and the same were used in the original construction of said road. Said ties and timber were cut from the nearest timber-bearing public lands to said line of road, and as defendant is informed and believes and therefore avers, said lands were and are adjacent to said line of road. That all of said ties and timbers were necessary for the original construction of said road and were used for said purpose, and this defendant entered upon said lands, through its said agent, and cut and removed said timber and trees in good faith, with no intention of violating any law, or committing any tresspass but verily believing that it had the right so to do, and if in any of said acts it has done any wrong, the same was not wilful or intentional, but was due to inadvertence and mistake. That, as defendant is informed and believes, and therefore alleges, said timber as it stood upon said lands when defendant caused the same to be cut, was not of a value to exceed one dollar per thousand feet nor were said ties and timbers worth to exceed said amount per thousand feet at the time this suit was
9 commenced, after deducting defendant's reasonable expenses in causing said ties and timbers to be cut, sawed, and deliverd to and upon it said line of road.

Wherefore defendant prays that plaintiff take nothing and defendant recover its costs.

P. L. WILLIAMS,
F. S. DETRICH,
Attorneys for defendant.

STATE OF IDAHO,
County of Bannock, ss.:

E. C. Manson, being first duly sworn, says that he is one of the directors of the defendant corporation, and makes this verification upon its behalf; that he has read the foregoing answer and known the contents thereof, and the same is true of his own knowledge except as to matters therein stated to be upon information or belief, and as to those matters he believes it to be true.

E. C. MANSON.

Subscribed and sworn to before me this 12 day of November, 1900.

[SEAL.] THOS. F. TERRELL,
Notary Public.

(Endorsed:) No. 63. In the circuit court of the United States, district of Idaho. United States vs. St. Anthony Railroad Company. Answer. Filed November 13, 1900, at 2.25 p. m. A. L. Richardson, clerk. By Theo. Turner, deputy.

10 In the circuit court of the United States within and for the district of Idaho, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Demurrer to answer.

Comes now the plaintiff and demurs to defendant's answer, on file herein, for the reason that said answer does not state facts sufficient to constitute a defense to plaintiff's cause of action as set forth in plaintiff's complaint, on file herein.

R. V. COZIER,
Attorney for Plaintiff.

I, R. V. Cozier, attorney for plaintiff in the above entitled action, do hereby certify that, in my opinion, plaintiff's demurrer to defendant's answer, on file herein, is well founded in point of law.

R. V. COZIER.

(Endorsed:) No. 63. In the circuit court of the United States within and for the district of Idaho, southern division. United States of America, Plaintiff vs. St. Anthony Railroad Company, a corporation, defendant. Demurrer to answer. Filed November 24th, 1900. A. L. Richardson, clerk. R. V. Cozier, attorney for plaintiff.

11 In the circuit court of the United States within and for the district of Idaho, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Agreed statement of facts.

It is agreed that the facts involved in this case are as follows, to wit:

1. The allegations contained in the plaintiff's complaint, not denied in the defendant's answer, are true.

2. That the amount of timber and lumber cut or taken by defendant is correctly stated in the answer, and that lands upon which the same was cut are correctly described in the complaint, and said lands were and are unoccupied, unentered public lands of the United States; that said timber or lumber was cut and carried away at the times stated in the complaint, and its value, upon delivery to defendant, was as alleged in the complaint.

3. That paragraphs one, two, and three of the affirmative part of defendant's answer are true.

4. That the fourth paragraph of said affirmative part of the answer is true, except the averment of value, the averment as to good faith and mistake, and the averment of "adjacency," and as to those matters it is agreed—

a. That the value of said timber at the time and under the circumstances therein stated is one and 50-100 ($1.50) dollars per thousand, instead of one dollar as alleged.

12 b. That as to the question of intent, it is agreed that defendant did not act under a mistake of fact. That is to say, defendant knew all of the facts touching the status of said timber and said lands and did what was done believing that it had the legal right so to do, such belief being based upon the advice of its counsel, an attorney of this court, to the effect that it had such right. Defendant used ordinary care and prudence in first being advised as to the law, all the facts as they herein appear relating to the status of said timber being known to said counsel, and there was no intention on the part of defendant to violate any law or to do any wrongful act.

c. Upon the issue of the "adjacency" of the lands upon which the timber in question was cut to defendant's railroad, where and in the construction of which said timber so cut was used, it is agreed that said lands from the place where said timber was used were and are the following distances, namely, from seventeen to twenty-three miles by air line; from twenty miles to twenty-five miles by wagon road, and from twenty-two to twenty-six miles following the sinuosities of the river upon which said timber was in part conveyed. By far the larger part of said timber was driven or rafted down said river from said lands to said railroad, the other part being hauled by wagon. The wagon road referred to and so used is an ordinarily good road and involves no unusual grades, and said timber could, with reasonable profit, be hauled by wagon from the place where it was cut to said railroad, where it was used for ties and in the construction of bridges.

13 It is further agreed that there were no other timber lands or suitable timber upon either side of said railroad as near as were the lands and timber in question, and that said lands are near enough and so located with reference to said railroad as to be directly and materially benefitted thereby.

5. That upon the foregoing statement of facts the following questions are to be submitted to the court for its decision:

a. What are adjacent lands within the meaning of the act of Congress of March 3d, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States?"

b. Whether said lands from which said timber was cut were adjacent to the said St. Anthony Railroad within the meaning of the said act?

c. Had the said railroad company the right under said act to take from the said public lands timber necessary for the construction of its railroad?

d. To what extent and for what amount is the said St. Anthony Railroad Company responsible for the timber cut as aforesaid, if at all?

e. To what extent and for what amount is said railroad company liable, if at all, upon the above statement of facts and under the law as it shall be decided by the court?

That judgment shall be entered by the court upon the foregoing statement of facts and upon the law as it shall decide it.

That the admissions made in this statement of facts shall bind the parties hereto only for this suit, and shall not bind them as to any other matter or case.

14 Each of the statements of fact contained in the foregoing stipulation is made subject to the objection of either party that said statement is irrelevant or immaterial.

Dated December 31, 1900.

R. V. COZIER,
Attorney for Plaintiff.
P. L. WILLIAMS,
F. S. DIETRICH,
Attorneys for Defendant.

(Endorsed:) No. 63. In the circuit court of the United States within and for the district of Idaho, southern division. United States of America, plaintiff, vs. St. Anthony Railroad Company, a corporation, defendant. Stipulation. Filed January 1, 1901. A. L. Richardson, clerk. R. V. Cozier, attorney for plaintiff. P. L. Williams and F. S. Dietrich, attorneys for defendant.

In the circuit court of the United States within and for the district of Idaho, southern division.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Judgment.

This cause having come regularly on to be heard at the city of Pocatello, Idaho, upon the 8th day of April, 1901, R. V. Cozier, esq.,
15 United States district attorney for Idaho, appearing as counsel for the plaintiff, and F. S. Dietrich, esq., as counsel for the defendant, a stipulation in writing having theretofore been entered into by said counsel for the respective parties and filed herein January 1, 1901, containing a statement of the facts involved, and wherein it was agreed that judgment should be entered by the court upon said statement of facts and upon the law; the said counsel having made their arguments to the court, and the court being fully advised in the premises and having concluded that upon said statement of facts and under the law plaintiff has no cause of action, that judgment should be entered accordingly.

It is therefore ordered, adjudged, and decreed that plaintiff take nothing by reason of the complaint herein, and that this action be and the same is hereby absolutely dismissed.

Dated this 23d day of April, 1901.

JAS. H. BEATTY, *Judge.*

(Endorsed:) No. 63. United States circuit court, southern division, district of Idaho. United States of America vs. St. Anthony Railroad Company. Judgment. Filed April 23, 1901. A. L. Richardson, clerk.

In the circuit court of the United States for the district of Idaho.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

16 *Opinion.*

R. V. Cozier, U. S. district attorney, for plaintiff. P. L. Williams and F. S. Dietrich, for defendant.

This action is for timber taken from the pnblic domain and used in the construction of a railroad. It is submitted to the court upon a stipulation of facts, among which are: That the timber was from 17 to 23 miles by air line, from 20 to 25 miles by wagon road, over which it could be hauled with reasonable profit; and from 22 to 26 miles by river, down which the greater part was rafted; that there were no other timber lands nearer the road, and that they were near enough to it to be "directly and materially benefited thereby." The questions presented were: (1) Whether these lands were "adjacent" to a road within the meaning of the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States," including the right "to take from the public lands adjacent to the line of said road material, earth, stone, and timber, necessary for the construction of said railroad," 18 St., 482; and (2) if defendant is held liable, whether it must be as an innocent or as a wilful trespasser.

The act in question has been a subject of great uncertainty, and the word "adjacent" has not yet been given any definite limits by the court of last resort. There is no guide by which to arrive at the concealed will of the lawmakers. Some of the courts have said that the conclusion in each case must be controlled by its facts. It will not profit to generally review the decisions. In that of Stone vs. United

17 States, 64 Fed., 667, and 167 U. S., 178, the trial court had instructed the jury "that adjacent lands means land in proximity and contiguous to or near to the road," which was affirmed. The timber in question there was used in the construction of the Spokane and Palouse, and the Central Washington railroads, which run through a country devoid of timber, and the timber used was the nearest to the roads, but it appears on page 673, 64 Fed., supra, that it "was cut from lands along the line of the Northern Pacific, about 50 miles distant from the eastern end of the roads," on which it was used.

On the next page the court says: "We are of opinion that, under the facts presented in this case, it could not fairly be said, under any reasonable construction of the language of the act, that the timber was taken from lands "adjacent to the line of either of the roads in the construction of which it was used." The court was certainly justified in holding that "under the facts presented" the timber was not adjacent to either of the roads on which it was used, for it was taken from lands along the line of another road. It would seem that this fact rather than the distance was, or at least could have been, the controlling question which led the court to its conclusion. At any rate, it does not determine

how far timber must be from a road to be without the boundary of adjacency. That 50 miles would be without such boundary there can be little doubt, when we consider the reasoning of all the authorities and the object of the law. That it extends beyond the mere right of way of the road can not be doubted, for thus to limit it would rob the law of its intended good. If it be confined to lands immediately contiguous
18 to the road, the question still remains, Where does contiguity end, or how far back from the contiguous line the right would extend, for to some extent it must go.

The case of Bacheldor vs. United States, 83 Fed., 986, by the eighth circuit court of appeals, is similar in its facts to those in this case. The timber cut was 21½ miles from the line of the road, or 25 miles by wagon road, and it was the nearest timber to the part of the road for which it was taken. The court held it adjacent to the road, and when so holding it had before it the Stone case, as reported in 64 Fed., supra, which it does not criticise, and it must have known of the decision of the same case by the Supreme Court, reported in 167 U. S., supra, for the latter had been decided seven months prior. Certainly this court would follow the ruling of the court of appeals of this circuit in preference to that of other appellate courts of like jurisdiction when their rulings differ. All the facts considered, the conclusion that these courts are not in conflict would seem to be fully justified; if so, it should then follow that this court should be governed by the decision of the eighth circuit court of appeals.

The additional facts in this case that the lands from which the timber was cut were within such a distance from the road as to be materially benefited by it, and that the timber was so accessible by water transportation as to make its use profitable to the road, may be additional reasons, in view of the argument of some of the cases, why in this case it should be held that the defendant had the right to its use.

It is ordered that judgment be for defendant.

BEATTY, *Judge*.

19 APRIL 22, 1901.

To the above decision the plaintiff by its counsel excepted in due form of law.

(Endorsed:) No. 63. United States circuit court, southern district of Idaho. The United States vs. St. Anthony Railroad Company. Opinion. Filed April 22, 1901. A. L. Richardson, clerk.

In the circuit court of the United States within and for the district of Idaho.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Petition for writ of error.

The plaintiffs feeling themselves aggrieved by the judgment made and entered by said court on the 23d day of April, A. D. 1901, against said plaintiffs and in favor of said defendant, comes now, by R. V. Cozier, their attorney for the district of Idaho, and petitions said court for an

order allowing these plaintiffs a writ of error from the judgment herein to the honorable United States circuit court of appeals for the ninth circuit, sitting at the city of San Francisco, State of California, according to the laws of the United States in that behalf made and provided.

R. V. COZIER,

United States attorney for Idaho and attorney for plaintiffs.

20 (Endorsed:) No. 63. In the circuit court of the United States within and for the district of Idaho. United States of America, plaintiff, vs. St. Anthony Railroad Company, defendant. Petition for writ of error. Filed July 22, 1901. A. L. Richardson, clerk. R. V. Cozier, attorney for plaintiff.

In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFFS IN ERROR,
vs.
THE ST. ANTHONY RAILROAD COMPANY, DEFENDANT in error.

Assignment of errors.

In the matter of the petition of the United States of America for a writ of error.

ASSIGNMENT OF ERRORS.

Afterwards, to wit, on the day , A. D. 1901, at the October term of the United States circuit court of appeals for the ninth circuit, in the city of San Francisco, State of California, comes the United States of America, by R. V. Cozier, their attorney for the district of Idaho, and says that in the record and proceedings in the above-entitled matter there are manifest errors, in this, to wit:

21 1. That the circuit court of the United States for the district of Idaho erred in deciding, upon the stipulation and agreed statement of facts submitted, that the lands from which the timber was cut, as described and set forth in the complaint of plaintiffs in error, were adjacent to the line of the St. Anthony Railroad Company within the meaning of the act of Congress March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States."

2. The said circuit court erred in deciding upon the stipulation and agreed statement of facts, that the defendant in error had the right under said act of Congress to take from said public lands timber to be used in the construction and building of its railroad.

3. The said circuit court erred in deciding, upon said stipulation and agreed statement of facts, that in cutting the said timber from the said public lands the said defendant in error did not commit wilful trespass for which it was civilly liable in damages to plaintiffs in error for the full manufactured value of the timber so cut.

4. The said circuit court erred in deciding, upon said stipulation and agreed statement of facts, that the said defendant in error was not liable

to plaintiffs in error for the full amount of damages alleged and prayed in the complaint.

5. The said circuit court erred in deciding, upon said stipulation and agreed statement of facts, that the defendant in error was not liable to plaintiffs in error for any amount, or at all, for the said timber cut and removed from said public lands.

22 6. The said circuit court erred in deciding, upon said stipulation and agreed statement of facts, in favor of defendant and against plaintiff.

7. The said circuit court erred in ordering judgment to be had for said defendant in error.

Wherefore, the said plaintiffs in error pray that the decision and order of the said circuit court of the United States within and for the district of Idaho, be reversed, and that the said circuit court be ordered to enter an order that judgment be entered for the plaintiffs in error according to the prayer of their complaint.

R. V. COZIER,
Attorney for Plaintiffs in Error.

Service of the within and foregoing assignment of errors, together with a true copy thereof, accepted this day of , 1901.

Attorney for Defendant in Error.

(Endorsed:) No. 63. In the United States circuit court of appeals for the ninth circuit. United States of America, plaintiffs in error, *vs.* St. Anthony Railroad Company, defendant in error. Assignment of errors. Filed July 22, 1901. A. L. Richardson, clerk. R. V. Cozier, attorney for plaintiffs in error.

23 In the circuit court of the United States within and for the district of Idaho, southern division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Order for writ of error.

This 22d day of July, A. D. 1901, came the plaintiffs, the United States of America, by their attorney, R. V. Cozier, and filed herein and presented to this court their petition praying for the allowance of a writ of error, intended to be urged by said plaintiffs, and said defendant also having filed herein an assignment of errors as provided by law, on consideration whereof it is ordered that a writ of error to the United States circuit court of appeals for the ninth circuit from the judgment hereinbefore, to wit, on the 23d day of April, A. D. 1901, made and entered in favor of the defendant herein and against the plaintiffs herein be, and the same is hereby, allowed, and that a complete transcript of the record forthwith be transmitted to the said United States circuit court of appeals for the ninth circuit, sitting at the city of San Francisco, State of California.

Dated at Boise, this 22d day of July, A. D. 1901.

JAS. H. BEATTY, *Judge.*

(Endorsed:) No. 63. In the circuit court of the United States within and for the district of Idaho. United States of America, plaintiff, vs. St. Anthony Railroad Company, defendant. Order of writ of error. Filed July 22, 1901. A. L. Richardson, Clerk.

24 *Citation.*

THE UNITED STATES OF AMERICA, ss.

To the St. Anthony Railroad Company, and to P. L. Williams and F. S. Dietrich, attorneys, greeting:

You are hereby cited and admonished to be and appear at a term of the United States circuit court of appeals for the ninth circuit, to be holden in the city of San Francisco, State of California, on the 20th day of August, A. D. 1901, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the district of Idaho, wherein the United States of America are plaintiffs in error and you are defendant in error, to show cause, if there be any, why the judgment in said writ of error should not be canceled and speedy justice should not be done to parties in that behalf.

JAS. H. BEATTY, *Judge.*

[SEAL.] A. L. RICHARDSON, *Clerk.*

Service of the within and foregoing citation accepted, together with a true copy thereof, this 24th day of July, A. D. 1901.

P. L. WILLIAMS and
F. S. DIETRICH,
Attorneys for defendant and defendant in error.

(Endorsed:) Citation. Filed July 25th, 1901. A. L. Richardson, clerk.

25 *Writ of error.*

Writ of error from circuit court of appeals to circuit court.

THE UNITED STATES OF AMERICA, ss:

The President of the United States of America to the judge of the circuit court of the United States for the district of Idaho, greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is in the said circuit court, before you, between the United States of America, plaintiffs, and the St. Anthony Railroad Company, defendant, a manifest error has happened, to the great damage of the said plaintiffs, as is said and appears by the complaint of plaintiffs. We being willing that such error, if any hath been, should be fully corrected and full and speedy justice done to the parties in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the justices of the United States circuit court of appeals for the ninth circuit, at the court room of said court in the city of San Francisco, State of California, together with this writ, so that you have the same at said place, before the justices aforesaid, on the

20th day of August, A. D. 1901, that the record and proceedings aforesaid be inspected, the said justices of the said circuit court of appeals may cause further to be done herein, to correct that error, what of right and according to law and custom of the United States ought to be done.

26 Witness the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, and the seal of our said circuit court, affixed at Boise, in said district, this 22d day of July, A. D. 1901.

[SEAL.] A. L. RICHARDSON, *Clerk.*

The foregoing writ is hereby allowed.

JAS. H. BEATTY, *Judge.*

Service of the within and foregoing writ of error, together with a true copy thereof, accepted this 24th day of July, A. D. 1901.

P. L. WILLIAMS and
F. S. DIETRICH,
Attorneys for Defendant and Defendant in Error.

(Endorsed:) Writ of error. Filed July 25th, 1901. A. L. Richardson, clerk.

Return to writ of error.

And thereupon it is ordered by the court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States circuit court of appeals for the ninth circuit, and the same is transmitted accordingly.

[SEAL.] A. L. RICHARDSON, *Clerk.*

27 In the circuit court of the United States within and for the district of Idaho, southern division.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
ST. ANTHONY RAILROAD COMPANY, DEFENDANT.

Clerk's certificate.

I, A. L. Richardson, clerk of the circuit court of the United States in and for the district of Idaho, do hereby certify the foregoing transcript of pages numbered from 1 to 28, inclusive, to be a full, true, and correct copy of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record herein and return to the annexed writ of error.

Witness my hand and the seal of said circuit court, affixed at Boise, Idaho, this 30th day of July, A. D. 1901.

[SEAL.] A. L. RICHARDSON, *Clerk.*

(Endorsed:) In the United States circuit court of appeals for the ninth circuit. The United States of America, plaintiffs in error, *vs.* The St. Anthony Railroad Company. Error to the United States circuit court for the district of Idaho, southern division. Transcript of record. Filed August 2, 1901. F. D. Monckton, clerk.

28 *Proceedings in U. S. circuit court of appeals for the ninth circuit.*

29 In the United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
THE ST. ANTHONY RAILROAD COMPANY, DEFENDANT in error.
No. 731.

Error to the United States circuit court for the district of Idaho, southern division.

This is an action to recover from the defendant in error the value of timber cut by it upon the public lands of the United States in Idaho, for use in the construction of the railroad of the defendant in error. After the filing of complaint and answer, the case was submitted to the lower court upon an agreed statement of facts, substantially as follows:

The plaintiff in error was the owner and in possession of the lands described in the complaint. During the summer and fall of the year 1889 the defendant in error, an Idaho corporation, entered upon the said lands, and through its agents and representatives cut and removed therefrom 1,682,975 feet of timber of the manufactured value of $12.35 per thousand feet and of a stumpage value of $1.50 per thousand feet, and used the same in the construction of its railroad between Idaho Falls, in Bingham County, and St. Anthony, in Fremont County, State of Idaho, a distance of approximately forty miles. Said railroad passed through public lands of the United States, and the defendant in error had
30 duly complied with all the requirements of the act of March 3, 1875, granting to railroad companies the right of way through the public land of the United States, and became entitled to the benefits and privileges therein granted to railroad companies. The timber was cut at a distance from the road of 17 to 23 miles by air line, from 20 to 25 miles by wagon road, and from 22 to 26 miles following the windings of the river, down which much of the timber was rafted. The remaining portion was hauled by wagon, the road being a good one, with no unusual grades, and the timber could be hauled by wagon to the place where it was used with reasonable profit. There was no other suitable timber-bearing land upon either side of the line of the railroad as near as were the lands in question, and said lands were so situated with reference to said railroad as to be benefited thereby.

It is admitted that the defendant in error in going upon said lands and cutting and removing timber therefrom did not act under a mistake of fact, but believed that it had the right to do so, using ordinary care and prudence and acting under the advice of its counsel.

Upon the questions involved in this statement of facts the court below rendered its decision in favor of the defendant railroad company, and the plaintiff sued out a writ of error thereupon to this court.

R. V. Cozier, U. S. attorney, for plaintiff in error.
P. L. Williams and F. S. Dietrich, attorneys for defendant in error.
Before Gilbert, Ross, and Morrow, circuit judges.

MORROW, circuit judge, delivered the opinion of the court:

31 The assignments of error present this question: Were the lands from which the timber was cut by the defendant in error "adjacent" to the line of its railroad, within the meaning of the act of March 3, 1875?

Section 1 of the said act provides:

"The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and the proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take from the public land adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of its said railroad." (18 Stats., 482.)

It is contended by the plaintiff in error that the word "adjacent" in this section should be construed to mean "in proximity to," "contiguous," or "near" the line of the railroad, and that the distance of 17 to 26 miles cannot reasonably come within such a definition. The section has been variously construed by the trial courts, but not definitely passed upon by the court of last resort. In United States v. Denver & R. G. Ry., 31 Fed., 886, the court construed the language of the act as intending to indicate such timber and other materials as could be conveniently reached by ordinary transportation by wagons. In United States vs. Chaplin, 31 Fed., 890, land was declared to be "adjacent" within the purpose and intent of the act, when by reason of its proximity thereto it is directly and materially benefited by the construction of the railroad. And in United States v. Lynde, 47 Fed., 297, 300, the court expressed the opinion that just what should be considered adjacent land must be determined by the evidence in each particular case. The latter view has met with the approval of this court, as indicated by the opinion of Judge Hawley in Stone v. United States, 29 U. S. App., 32; 64 Fed., 667. No exact definition was there attempted, the court merely holding that "under the facts presented" a reasonable construction of the language of the act
32 would not permit the timber land in question to be deemed adjacent to the line of railroad of the defendant company. This decision was affirmed by the Supreme Court of the United States (Stone v. United States, 167 U. S., 178, 191) without further determining the boundary of adjacency contemplated by the act of Congress. The court concurred with the view expressed in Denver & R. G. Ry. v. United States, 34 Fed., 838, 841, that Congress did not intend to grant anything like a general right to take timber from land where it was most convenient, but other than this expression did not attempt to interpret the language of the act, and left the decision dependent upon the particular facts presented.

It is well settled that, while public grants are to be construed strictly against the grantees, they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. And to ascertain that intent it is often necessary to look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of

them together. Winona & St. Peter R. R. v. Barney, 113 U. S., 616, 625. In United States v. Denver, &c., R. R., 150 U. S., 1, 15, this rule of construction was held to be properly applicable to the act of 1875 in controversy in the present action. In that case the timber was cut from lands adjacent to the line of railroad of the defendant, but was used in the construction of its road at points distant from the place at which it was taken. Under the rule of construction above stated, it was held to be the purpose of Congress to aid railroad companies, entitled to the benefits of the act, by conferring the right to take timber necessary for road construction from adjacent public lands and use it upon distant portions of their lines.

33 Applying, then, this liberal construction of the act to the facts before us, we are entitled to consider that the road under construction passed through a barren, frontier country; that according to the admitted facts there was no suitable timber upon either side of the said road nearer than the lands in question, and that said lands from which the timber was cut were near enough and so located with reference to said road as to be directly and materially benefited thereby; that said timber could be hauled by wagon to said railroad with reasonable profit. These conditions are important in considering whether the privilege conferred by Congress has been properly exercised, and whether the mutual benefits contemplated by the act are likely to be realized.

The case of Bacheldor v. United States, 83 Fed., 986, presented a similar state of facts to the one at bar. Bacheldor, acting for the Denver & Rio Grande Ry. Co., had cut timber from Government land some 25 miles distant by wagon road from the line of railroad, in the construction of which it was to be used. No suitable timber could be found nearer. The trial court instructed the jury that the word "adjacent," as used in the act of Congress authorizing the cutting of timber for railroad construction, meant the tier of townships lying adjoining on either side of the townships upon or through which the line and right of way of the proposed railroad passed. The supreme court of the Territory of New Mexico affirmed the conviction of Bacheldor, but the judgments of both courts were reversed by the circuit court of appeals for the Eighth circuit, Judge Thayer, speaking for the court, declaring that no court can say, as a matter of law, that a trespass was committed because timber was taken from a place 25 miles distant by wagon road from the right of way of the railroad; but it should be left to a jury of the vicinage to determine, under proper instructions from the court, whether the right accorded by the statute was fairly exercised as Congress intended it should be. The fact that Congress did not in definite terms limit the right to take timber and

34 other materials to adjoining townships, but used the word "adjacent," a purely relative term, which may be understood differently when applied to different objects or under different circumstances, was there considered very persuasive evidence that Congress did not intend to fix an arbitrary line beyond which the right to take timber and other materials should not extend, but that its purpose was to leave such right to be governed by circumstances. It was further said:

"Congress intended to offer substantial inducements for the construction of railroads in certain sections of the country where timber suitable

for railroad construction was known to be scarce, and in many places distant from the lines of road to be benefited, as they would be projected and built. For that reason it did not establish a fixed line on either side of the right of way, which, if established, would at times render the privilege of taking material valueless; but it chose to confer the privilege in such terms as would allow the land department, and courts and juries as well, some discretion in determining, under different conditions, what was a proper limit within which it might be exercised. It accordingly authorized timber and other materials to be taken from adjacent lands, leaving those wh[illegible] duty it would be to see that the right was not abused, but was exercised in a reasonable manner, to decide in any given case whether the land from which material had been obtained was adjacent to the right of way within the spirit and intent of the act."

We are in accord with this construction of the act. And while under some circumstances the cutting of timber from public lands at a distance of from 17 to 26 miles from the line of railroad under construction would undoubtedly be deemed a trespass, as without the meaning of the word "adjacent" in said act, the circumstances of the present case do not warrant such a holding. No injury appears to have been suffered by the plaintiff in error by reason of the act of the defendant in error; on the contrary, the land from which the timber was cut is admittedly benefited by the construction of the railroad, and, under all the conditions existing, it should be considered to be "adjacent" to the line of railroad constructed by the defendant in error, as contemplated by the act of 1875.

The judgment of the circuit court is affirmed.

(Endorsed:) Opinion. Filed Mar. 3, 1902. F. D. Monckton, clerk.

35 United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error, v. THE ST. ANTHONY RAILROAD CO., DEFENDANT in error. } No. 731.

Judgment.

In error to the circuit court of the United States for the district of Idaho, southern division.

This cause came on to be heard on the transcript of the record from the circuit court of the United States for the district of Idaho, southern division, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said circuit court in this cause be, and the same is hereby, affirmed.

(Endorsed:) Judgment. Filed and entered Mar. 3, 1902. F. D. Monckton, clerk.

36 In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,
vs.
THE ST. ANTHONY RAILROAD COMPANY, DEFENDANT in error.

Petition for writ of error.

The United States of America, plaintiff in error herein, feeling itself aggrieved by the judgment made and entered by the United States circuit court of appeals for the ninth circuit on the 3rd day of March, 1902, wherein the United States of America was plaintiff in error and the St. Anthony Railroad Company was defendant in error, and wherein said United States circuit court of appeals affirmed the judgment of the United States circuit court for the district of Idaho, made and entered on the 22nd day of April, 1901, against the plaintiff in error and in favor of the defendant in error, comes now by P. C. Knox, Attorney-General of the United States, and R. V. Cozier, United States attorney for the district of Idaho, and petitions said court for an order allowing said plaintiff in error to prosecute a writ of error to the honorable the Supreme Court of the United States according to the law of the United States in that behalf made and provided.

A certified copy of the entire record of the said case in the said circuit court of appeals is herewith furnished as part of this application and the same is marked "Exhibit A."

P. C. KNOX,
Attorney-General of the United States.
R. V. COZIER,
U. S. Attorney, District of Idaho, Attorneys for Plaintiff in Error.

37 (Endorsed:) Petition for writ of error. Filed September 10th, 1902. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

38 In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
THE ST. ANTHONY RAILROAD COMPANY, DEfendant in error.

Assignment of errors.

Comes now the plaintiff in error, by its counsel, and submits the following assignments of error upon which it relies to reverse the judgment of the United States circuit court of appeals for the ninth circuit in the above-entitled cause:

1st. Said circuit court of appeals erred in its decision, filed March 3, 1902, that, upon the stipulation and agreed statement of facts filed in the United States circuit court for the district of Idaho, as shown by the record herein, the public lands of the United States from which the timber

in dispute was cut and removed, as described and set forth in the complaint of the plaintiff in error, were adjacent to the railroad line of the defendant in error within the meaning of the act of Congress of March 3, 1875, entitled "An act granting railroads the right of way through the public lands of the United States."

2nd. Said circuit court of appeals erred in deciding, upon the said stipulation and agreed statement of facts, that the defendant in error had the right, under said act of Congress, to take from said public lands the timber to be used in the construction and building of its railroad.

3rd. Said circuit court of appeals erred in deciding, upon the said stipulation and agreed statement of facts, that in the cutting and removal of said timber from said public lands the defendant in error did not commit willful trespass, for which it was civilly liable to plain-
39 tiff in error for the full manufactured value of the timber so cut and removed.

4th. Said circuit court of appeals erred in deciding, upon said stipulation and agreed statement of facts, that defendant in error was not liable to plaintiff in error for the full amount of damages as alleged and prayed for in the complaint of plaintiff in error, or for any amount, or at all.

5th. Said circuit court of appeals erred in deciding, upon said stipu- and agreed statement of facts, in favor of defendant in error and against plaintiff in error.

6th. Said circuit court of appeals erred in affirming the judgment of the said circuit court of the United States for the district of Idaho.

7th. Said circuit court of appeals erred in not reversing the judgment of the said circuit court of the United States for the district of Idaho, and directing it to enter a judgment in favor of plaintiff in error and against defendant in error.

Respectfully submitted.

P. C. KNOX,
Attorney-General of the United States.

R. V. COZIER,
U. S. Attorney for the District of Idaho,
for Plaintiff in Error.

(Endorsed:) Assignment of errors. Filed September 10th, 1902. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

40 United States circuit court of appeals for the ninth circuit.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
v.
THE ST. ANTHONY RAILROAD COMPANY, DEFENDANT in error.
No. 731.

Certificate to Clerk C. C. A. to transcript.

I, Frank D. Monckton, clerk of the United States circuit court of appeals for the ninth circuit, do hereby certify the foregoing thirty-nine (39) pages, numbered from one (1) to thirty-nine (39), inclusive, to be a true copy of the record and of the assignment of errors, and of all proceedings in the above-entitled case, including the opinion filed, as the

same remain of record in my office, and that the same, together, constitute the return to the annexed writ of error.

Attest my hand and the seal of the said United States circuit court of appeals for the ninth circuit, at San Francisco, California, this 12th day of September, A. D. 1902.

[SEAL.]

F. D. MONCKTON, *Clerk*,
By MEREDITH SAWYER,
Deputy Clerk.

41 UNITED STATES OF AMERICA, *ss:*

The President of the United States, to the honorable the judges of the U. S. circuit court of appeals for the ninth circuit, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said U. S. circuit court of appeals before you, or some of you, between The United States of America, plaintiff in error, and The St. Anthony Railroad Company, defendants in error, a manifest error hath happened, to the great damage of the said the United States, plaintiff in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 19th day of August, in the year of our Lord one thousand nine hundred and two.

[SEAL.]

JAMES H. MCKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by

JOSEPH MCKENNA,
Associate Justice of the Supreme Court of the United States.

42 *Return of writ of error.*

The answer of the judges of the United States circuit court of appeals for the ninth circuit:

As within we are commanded, we certify under the seal of our circuit court of appeals in a certain schedule to this writ annexed the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within-named defendant in error.

By the court:

[SEAL.]

F. D. MONCKTON, *Clerk.*
By MEREDITH SAWYER,
Deputy Clerk.

(Indorsed:) No. 731. United States circuit court of appeals for the ninth circuit. The United States of America, plaintiff in error, vs. The St. Anthony Railroad Company, defendant in error. Original writ of error. Filed September 10th, 1902. F. D. Monckton, clerk. By Meredith Sawyer, deputy clerk.

43 UNITED STATES OF AMERICA, *ss:*

To The St. Anthony Railroad Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the circuit court of appeals for the ninth circuit, wherein the United States of America is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph McKenna, associate justice of the Supreme Court of the United States, this 19th day of August, in the year of our Lord one thousand nine hundred and two.

JOSEPH MCKENNA,
Associate Justice of the Supreme Court of the United States.

44 Received a true and correct copy of the within citation at Pocatello, Idaho, this 27th day of August, 1902.

P. L. WILLIAMS,
T. S. DURANT,
Attorneys for Defendant in Error.

45 OREGON SHORT LINE RAILROAD COMPANY,
LAW DEPARTMENT,
Pocatello, Idaho, August 27, 1902.

Mr. R. V. COZIER,
U. S. Attorney, Moscow, Idaho.

DEAR SIR: Herewith I hand you original citation with acknowledgement of service in the timber-cutting case. Personally I would have no objection to signing the acknowledgment of service in the form in which you had it, but Mr. Williams now has control of this, and I do not know just what the status of the case is, and I have therefore thought it best to simply acknowledge the fact of service. In all probability it makes no difference.

Yours, truly, F. S. DIETRICH, *Assistant Attorney.*
Encl.

46 (Indorsed:) No. 731. United States circuit court of appeals for the ninth circuit. The United States of America, plaintiff in error, vs. The St. Anthony Railroad Company, defendant in error. Original citation. Filed Sep. 10, 1902. F. D. Monckton, clerk, by Meredith Sawyer, deputy clerk.

(Indorsement on cover:) File No. 18707. U. S. C. C. of appeals, 9th circuit. Term No. 479. The United States, plaintiff in error, vs. The St. Anthony Railroad Company. Filed October 22d, 1902.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1903.

THE UNITED STATES, PLAINTIFF IN error,
v.
THE ST. ANTHONY RAILROAD COMPANY. } No. 147.

BRIEF IN BEHALF OF THE UNITED STATES.

STATEMENT OF THE CASE.

The precise question involved in this case is whether lands lying from 17 to 23 miles by "air line" from the St. Anthony Railroad Company's right of way are "adjacent lands" within the meaning of the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." (18 Stat., 482.) The facts in the case are substantially as follows:

On the 18th of May, 1899, the St. Anthony Railroad Company was duly incorporated under and pursuant to the laws of the State of Idaho for the purpose of constructing, owning, maintaining and operating a steam railroad, extending from the town of Idaho Falls in Bingham County,

Idaho, to St. Anthony, in Fremont County, in said State, *a distance of approximately 40 miles.*

On the 7th of July, 1899, the board of directors of the defendant company adopted as the route for said railway the line then surveyed and located by defendant's engineer and shown upon the maps then presented, which line of right of way is the same as that upon which the defendant's said railway was afterwards actually built, and upon which the same is now actually maintained and operated, and is practically a straight line between said town of Idaho Falls and said town of St. Anthony. This right of way so surveyed and adopted passed through and over certain public lands belonging to the United States, and on July 7, 1899, the railroad company filed in the local land office at Blackfoot, Idaho, a copy of the articles of incorporation and due proofs of its organization; also maps of said right of way, together with certificates and affidavits as required by law and the rules and regulations of the General Land Office, all of which were thereafterwards filed with the Secretary of the Interior at Washington on or about the 19th day of July, 1899, and by him approved October 4, 1899.

It is not denied by the Government that the defendant company fully performed all things required of railroad companies by the act of Congress granting to railroads right of way through the public lands of the United States, approved March 3, 1875, and that said company became and is en-

titled to the benefits and privileges granted by said act of Congress to railroad companies.

For the purpose of procuring the necessary material with which to construct said railroad from Idaho Falls to St. Anthony, the defendant company entered into a contract with the Thompson Mercantile Company, a corporation, of St. Anthony, Idaho, by the terms and conditions of which the said Mercantile Company was to furnish to defendant railroad company at the times and in the manner agreed upon, ties and timber of dimensions suitable for the construction of said railroad as specified in the contract; that the ties and timbers were to be used and were used solely for the purpose of the original construction of said railroad, and the said Mercantile Company was by the express terms of the contract appointed as the agent of the railroad company, and in that capacity was authorized to cut timber for such purpose and no other from the public lands of the United States described in the complaint, which lands were situated from 17 to 23 miles by air line from the company's right of way.

During the summer and fall of 1899, under and pursuant to such contract, and acting as the agent of the defendant railroad company, the Thompson Mercantile Company entered upon the lands of the United States described in the complaint and cut and removed trees and timber standing and growing upon said lands, amounting in the aggregate to 1,682,975 feet, board measure, which said timber

was thereafter duly delivered to the said railroad company and by it used in the original construction of said road.

On the 24th day of August, 1900, the United States brought suit against said railroad company to recover the value of this timber, alleging that it had been unlawfully cut and removed from the lands of the United States, and unlawfully converted to the use of the railroad company, and that the value of the timber at the time of the institution of such suit was $21,469.70.

On the 13th of November, 1900, the railroad company filed its answer, in which substantially all the facts set forth in the complaint were admitted, but by way of justification alleged that the timber had been cut from public lands "adjacent" to defendant's line of road, and that the defendant company was entitled to such timber under and by virtue of the provisions contained in the act of Congress of March 3, 1875.

On January 1, 1901, an agreed statement of facts was filed in the case, the material portion of which is the following:

> Upon the issue of the "adjacency" of the lands upon which the timber in question was cut to defendant's railroad, where and in the construction of which said timber so cut was used, it is agreed that said lands from the place where said timber was used were and are the following distances, namely, from 17 to 23 miles by air line, from 20 to 25 miles by wagon road, and from 22 to 26 miles follow-

ing the sinuosities of the river upon which said timber was in part conveyed. By far the larger part of said timber was driven or rafted down said river from said lands to said railroad, the other part being hauled by wagon. The wagon road referred to and so used is an ordinarily good road and involves no unusual grades, and said timber could, with reasonable profit, be hauled by wagon from the place where it was cut to said railroad, where it was used for ties and in the construction of bridges.

It is further agreed that there were no other timber lands or suitable timber upon either side of said railroad as near as were the lands and timber in question, and that said lands are near enough and so located with reference to said railroad as to be directly and materially benefited thereby.

The case was heard on the 8th day of April, 1901, upon this agreed statement of facts, before Hon. James H. Beatty, United States district judge for the district of Idaho, and the sole question presented to the court for its consideration was whether the lands in question were "adjacent" to defendant's right of way, within the meaning of the act of March 3, 1875. The court held that under the facts in this case, as disclosed by the pleadings and stipulation these lands were adjacent within the meaning of that act, dismissed the suit, and ordered that judgment be entered in favor of the defendant company. The case was thereupon taken to the circuit court of

appeals for the ninth circuit, and that court, on the 3d day of March, 1902, affirmed the judgment of the circuit court. The case is here on writ of error to the circuit court of appeals for the ninth circuit for the purpose of reviewing that judgment.

SPECIFICATION OF ERROR.

That the circuit court of appeals for the ninth circuit erred in its decision, filed March 3, 1902, in holding that upon the stipulation and agreed statement of facts filed in the United States circuit court for the district of Idaho, as shown by the record herein, the public lands of the United States from which the timber in dispute was removed, as described and set forth in the complaint of the plaintiff in error, were public lands "adjacent" to the railroad's right of way of the defendant in error, within the meaning of the act of Congress of March 3, 1875, entitled "An act granting to railroads the right of way through the public lands of the United States." (Record, pp. 15, 16, 17, and 18.)

THE LAW.

That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of 100 feet on each side of the central line of said road; *also the right to take from the public lands adjacent to*

the line of said road material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed in amount 20 acres for each station, to the extent of one station for each 10 miles of its road. (Act of Mar. 3, 1875, 18 Stat., 482, sec. 1.)

THE QUESTION OF LAW.

The question of law presented on this appeal is, whether lands lying from 17 to 23 miles distant by air line from the St. Anthony Railroad Company's right of way are to be considered public lands *adjacent* to the company's right of way, within the meaning of the act of Congress of March 3, 1875 (*supra*).

ARGUMENT, POINTS, AND AUTHORITIES.

The importance of this case to the Government can not be measured by the value of the timber which is involved in this suit. I do not exaggerate when I say that timber worth millions of dollars is the subject of suits now pending or about to be instituted by the Government in which the sole question at issue is the proper meaning of the word *adjacent* as used in this and similar acts of Congress. The Government has from the first contended that the word *adjacent* as used in this law has reference to a comparatively narrow belt

of public land situated on either side of the railroad company's right of way. In view of litigation now pending, and the great material interests involved, the Government feels especially called upon at this time to earnestly maintain that the word *adjacent* ought not to be construed as applicable to public lands more than two miles distant from a railroad company's right of way.

The Government's contention is that under the facts in this case the public lands from which the timber was cut and removed by the railroad company and its agents, and used by it in the construction of its line of road, were not *adjacent* lands within the meaning of said act of Congress.

It is of course a very difficult matter to determine just where "adjacency" terminates and "nonadjacency" begins within the meaning of this act of Congress, but it is manifest, and all courts agree, that lands within a few miles distant from a railroad are to be considered "adjacent lands." But beyond such distance there is great conflict among the decisions as to what lands should be considered adjacent, and as to what facts and circumstances are to be considered in each individual case for the purpose of determining whether lands can be considered as adjacent within the meaning of this law. The decisions seem to hold that each case as it arises must be determined from a consideration of its own peculiar facts. We will, therefore, briefly review the peculiar facts in

this case as disclosed by the pleadings and the stipulation.

The St. Anthony Railroad is approximately 40 miles in length, and practically a straight line of road connecting the town of Idaho Falls with St. Anthony, in the State of Idaho. The timber cut and appropriated by the railroad company from the public lands of the United States was cut from lands situated from 17 to 23 miles by "air line" from the defendant's right of way. It appears that the greater portion of the timber so appropriated by the company, was rafted down a river and that the remaining portion was hauled over a wagon road. It is admitted by the Government that the lands from which this timber was cut were materially and directly benfited by the building of the railroad, and that the timber could have been hauled at a reasonable profit from the place where it was cut to the place where it was used upon the company's right of way for ties and bridges.

The question arises upon this state of facts as to whether these lands are "adjacent" within the meaning of the act of March 3, 1875. The Government's contention is that they were not, for the reason that they were so far distant from the right of way that the court should say, as a matter of law, that they were not adjacent within the meaning of that act; and that the mere fact that the lands were directly and materially benefited by

the railroad, and that the timber was within such distance from the right of way that it could be hauled with a profit, is immaterial in cases of this character; that such facts can only be resorted to by the courts (if at all) when the lands are located so near to the right of way that it is difficult to determine where adjacency leaves off and nonadjacency begins. Or, to put the question in another way, suppose that the timber had been cut on lands from 50 to 100 miles distant from defendant's right of way, and it should appear that the lands from which the timber was cut were directly and materially benefited by the railroad, and that the timber could have been hauled with a profit, would such facts be sufficient to characterize the lands as lands *adjacent* to the company's right of way within the meaning of the law?

I.

ORDINARY MEANING OF THE WORD "ADJACENT," AS DEFINED BY LEXICOGRAPHERS.

It is manifest that the word *adjacent* is a relative term and that in order to ascertain its true meaning in any given case resort must be had to the context and the character of the objects with reference to which the word is used.

(*a*)

Century Dictionary and Cyclopedia:

> (L. adjacere—to lie near—). Lying near, close, or contiguous; adjoining; neighboring, as a field *adjacent* to the highway.

"Sauntering . . . along the banks of the *adjacent* mill pond." Irving, Sleepy Hollow.

"Tribes which are larger, or better organized, or both, conquer *adjacent* tribes and annex them." H. Spencer, Prin. of Sociol., No. 448.

Adjacent, lying near, neighboring, but not necessarily in contact. New York and the towns *adjacent*.

"From the barge
A strange invisible perfume hits the sense
Of the *adjacent* wharfs."
Shak., A. and C., ii, 2.

(*b*)

Crabbe's English Synonyms.—Mr. Crabbe, in his English Synonyms classifies together *adjacent*, *adjoining*, and *contiguous*, and after giving the etymology of these words illustrates the difference between them in the following manner:

What is adjacent may be separated by the intervention of some third object.

"They have been beating up for volunteers at York, and the towns *adjacent*, but nobody will list." (Granville.)

What is adjoining must touch in some part, as "he happens to have an estate adjoining equal to his own."

What is contiguous must touch entirely on one side.

"We arrived at the utmost boundaries of a wood which lay *contiguous* to a plain." (Steel.)

Lands are *adjacent* to a house or a town; fields are *adjacent* to each other; houses *contiguous* to each other.

(*c*)

Bouvier's Law Dictionary, vol. 1, page 93:

Adjacent. Next to, or near. Two of three lots of land might be described as adjacent to the first, while only the second could be said to be adjoining. 1 Cooke, 128; 7 La. Ann., 76.

(*d*)

Black's Law Dictionary, page 36:

ADJACENT. Lying near or close to; contiguous. The difference between *adjacent* and *adjoining* seems to be that the former implies that the two objects are not widely separated, though they may not actually touch, while adjoining imports that they are so joined or united to each other that no third object intervenes.

(*e*)

Anderson's Dictionary of Law:

ADJACENT. (Latin, adjacere, to lie near.) Near, but not touching. Applied to lots is synonymous with contiguous. In another relation it might have a more extended meaning.

II.

FEDERAL CASES WHEREIN THE WORD "ADJACENT," AS USED IN THE ACT OF CONGRESS OF MARCH 3, 1875, HAS RECEIVED JUDICIAL INTERPRETATION AND CONSTRUCTION.

United States v. Denver and Rio Grande Railroad, 31 Fed., 886.

This case was decided in August, 1887. The parties *stipulated* that the timber was cut from *lands adjacent* to the line of railroad as it was then or afterwards constructed, and it does not appear from the opinion how near the lands from which the timber was cut were situated with reference to the railroad company's right of way. The question decided in that case was that the privilege granted to the railroad company by the act of March 3, 1875, did not include the right to take timber from public lands and transport it by rail to distant parts of the road for use in construction and repairs. In the course of that decision, however, Judge Hallett discussed the meaning of the word "adjacent," as used in that act of Congress. He said (p. 889):

> The word "adjacent" seems to be of flexible meaning, and to depend very much upon the context and the subject-matter to which it may be applied for its proper effect. As used in these acts, and with reference to the lands which may be taken for stations, sidetracks, etc., it has the sense of contiguous or adjoining, while in the preceding paragraph, and with reference to material for building the road, it is claimed, and with

reason, that it should have the larger sense of nearness without actual contact. In a standard dictionary an illustration of the larger meaning of the word is given in this form: "Things are *adjacent* when they lie near to each other without actually touching, as adjacent fields, adjacent villages," etc. It seems unreasonable to say that in this connection the word refers to the government subdivisions lying next the right of way, and if we should so declare it would be difficult to point out what subdivisions are meant.

Accepting the larger meaning of the word, the right to take timber from public lands, under these acts, extends naturally some distance from the right of way, and probably within ordinary transportation by wagon.

If we are to be guided in ascertaining the meaning of the word *adjacent* by the rule announced by Judge Hallett in that case, we are simply forced to determine another uncertain quantity, to wit, what public lands are within "ordinary transportation by wagon." What would be *ordinary* transportation by wagon in one locality might be *extraordinary* transportation in another locality, and it does not seem to us that we are aided very materially by this opinion in ascertaining what is the true meaning of the term "adjacency" by being compelled to resort to something else which is as indefinite as the term we are attempting to define. There is surely nothing in the act of Congress which would warrant a resort to such a method, and it seems to

us that the reason here thus early assigned has been accorded undue prominence in the subsequent decisions of the courts in ascertaining the meaning of this word. Why should we resort to *ordinary transportation by wagon* for the purpose of ascertaining the meaning of the word *adjacent*? Why not resort to transportation by rail or water? These methods of transportation were known to Congress at the time of the passage of the act, and why should one be resorted to more than another for ascertaining what the word *adjacent* means?

United States v. Chaplin, 31 Fed., 890.

This case was decided in August, 1887, two days after the decision by Judge Hallett in the Denver and Rio Grande case (*supra*). It appears that the material was taken from certain townships through which the road was constructed, and no question was raised but that such lands were adjacent to the line of road.

Judge Deady, however, took occasion, in the concluding paragraph of his decision, to construe the word *adjacent* as used in the act of Congress above referred to. He said:

> This material appears to have been taken from certain townships through which the road runs, and no question is made but that such lands are "adjacent" to the line of road. What is "adjacent" land, within the meaning of the statute, must depend on the circumstances of each particular case.

> Where the "adjacent" ends and the non-adjacent begins may be difficult to determine. On the theory that the material is taken on account of the benefit resulting to the land from the construction of the road, my impression is that the term "adjacent" ought not to be construed to include any land save such as by its proximity to the line of the road is directly and materially benefited by its construction.

Judge Deady was, therefore, of the opinion that in order to ascertain what lands were adjacent to the line of road, the court should look to the proximity of such lands to the line of road for the purpose of ascertaining whether such lands were directly and materially benefited by its construction.

This seems to also involve the question in much uncertainty, for the reason that it is a difficult and often an impossible question to determine whether lands are directly and materially benefited by a certain railroad. And again, lands lying at a considerable distance and even remote from the road may be directly and materially benefited by the construction of the road, and still in no sense be adjacent to the line of road within any ordinary meaning of that term. Take, for example, one of the transcontinental lines, where there are no other railroads within hundreds of miles of certain timber lands except the one particular road, which may be at a distance of 50 to 100 miles, and the lands may be directly and materially ben-

efited by reason of the construction of such road and enhanced very considerably in value, yet in no sense could such lands be said to be adjacent to the line of road within the meaning of this act of Congress.

Denver and Rio Grande Railroad Company, 8 Land Decisions, 41.

A short time after the rendition of the decisions in *United States* v. *Denver and Rio Grande Ry. Co.* and *United States* v. *Chaplin* (*supra*), this law received consideration at the hands of the Secretary of the Interior in a letter to the Attorney-General, dated January 10, 1889, in which he says (p. 43):

> The adjective "adjacent," by which word the lateral limits of the area upon which the railroad company is authorized to take material for the construction of its road is defined, is indefinite and uncertain in signification. It is recognized that it must mean something more than "adjoining." Nothing in the term itself necessarily implies that the lines of surveys shall be resorted to to define its extent. There is, however, nothing in this indefiniteness which, it seems to me, can authorize the view that timber or other material can be taken from public land so far away as may be reached by wagon transportation in a single day, or any other given period of time. That appears to be wholly an arbitrary view, and one not in accordance with the general idea which one would derive from the use of this

adjective, as applied to lands adjacent to the railroad right of way—a narrow line drawn across the country. It seems to me that a much more restricted limitation must have been within the intention of Congress in the use of that term. I find support to this idea in the use of the same word in another connection immediately preceding, in the act of 1872, which provides that the right of way shall be granted, "one hundred feet in width on each side of the track," and also, "such public lands *adjacent* thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for yard room and side tracks, not exceeding twenty acres at any one station." A similar use of the word is also made in the act of 1875. This use of the word "adjacent" indicates a moderate right of appropriation of the public lands, which were conveniently contiguous to the right of way, and immediately accessible from it. I do not believe that it was the purpose of Congress, or that this Department ought to decide that a railroad company can range the public lands to secure material for the construction of its road, when it does not happen to exist on those lands which, in the ordinary acceptance of the phrase, would be regarded as "adjacent" to the right of way. It is perhaps necessary, for practical construction, to define some limit; and in acknowledgment of that necessity, and with a view to a proper protection of the interests of the Govern-

ment, I am of the opinion that it is as far as sound discretion will warrant executive officers to go until an authoritative decision by the courts, to hold that, under this phrase, material may be taken from the tier of sections through which the right of way extends, as immediately adjoining the right of way, and perhaps an additional tier of sections on either side, as within the idea of "adjacency." In employing this word of flexible signification, "adjacent," to indicate the territorial limits of this privilege to the railroad company, Congress has thrown upon the Department the necessity of determining a meaning to that word and of laying down a rule thereon for the guidance of the subordinate officers and the companies; and, in view of all the facts and considerations applicable, it is believed the definition and rule given are fair and just, and legitimately to be adopted. I think it wiser and safer to pursue such a rule, subject as it is to review by the courts, than to leave the matter open to the varying notions of different officers or the necessities of the companies.

It will thus be observed that Secretary Vilas thus early took issue with Judge Hallett in holding that the act authorized the taking of timber from public lands so far away as may be reached by ordinary wagon transportation, and characterizes such holding to be wholly an arbitrary view and not in accordance with the general idea which one would derive from the use of such adjective

in connection with a railroad right of way—a narrow line drawn across the country. Notice was thus early given by the Land Department, so far as was in its power to control railroad companies in the premises, that the Government would contend that the word *adjacent* as used in said act of Congress applied to the tier of sections through which the right of way extends, and perhaps an additional tier of sections on either side of the road in order to meet the idea of adjacency.

But see *Kootenai Valley R. R. Co.*, 28 L. D., 439.

Denver and Rio Grande Railway Company v. United States, 34 Fed., 838, Circuit Court, District of Colorado, May 10, 1888.

In this case there was an agreed statement of facts to the effect, among other things, that the lands from which the timber was cut were *adjacent lands*. Mr. Justice Brewer, in delivering the opinion in that case, said (p. 841):

> There is some dispute between counsel as to the questions that are involved in and presented by these facts. I shall not attempt to consider any that I do not think are fairly and clearly presented by the facts. The fourth paragraph stipulates that the lands from which the timber was cut were adjacent to the line of railway; hence I shall not stop to consider how near land must be to be adjacent, whether half a mile or 10 miles. I certainly do not agree with the idea, which seems to be expressed elsewhere, that the proximity of the lands is

> immaterial, or that Congress intended to grant anything like a general right to take timber from public land where it was most convenient. The grant was limited to adjacent lands, and I do not appreciate the logic which concludes that, if there be no timber on adjacent lands, the grant reaches out and justifies the taking of timber from distant lands—lands fifty or a hundred miles away; nor do I understand that the rule controlling the construction of ordinary public grants, to the effect that they are construed strictly against the grantee, does not apply to these grants.

This decision of Mr. Justice Brewer clearly intimates that the proximity of the lands to the railroad's right of way is a very material fact to be considered in ascertaining the meaning of the word adjacent. This case was afterwards affirmed by this court.

United States v. Denver and Rio Grande Railway Company, 150 U. S., 1.

Mr. Justice Jackson, in delivering the opinion of this court in that case, said (p. 11):

> By the agreed statement of facts it is admitted that the timber in question was taken from the public, unoccupied, unentered lands of the United States, which were located along, near, and adjacent to the line of the defendant's road. No question, therefore, can be raised as to the proper locality from which it was taken.

This language again shows that the court expressly reserved and pointed out the fact that the question as to what are *adjacent lands* was not open for consideration under the agreed statement of facts, and thus intimated that if such question had been left open for consideration, that the court would have considered the question of the proximity of the lands to the railroad company's right of way for the purpose of ascertaining whether they were lands adjacent within the meaning of the law.

United States v. Linde et al., 47 Fed., 297, Circuit Court, District of Montana, August 10, 1891.

This case was commenced in the district court of the third judicial district for the Territory of Montana, sitting for the trial and determination of causes arising under the Constitution and laws of the United States. The complaint alleged that the defendants, between the 1st of April, 1882, and the 1st of April, 1886, willfully and unlawfully, and without right, went upon the unsurveyed mineral lands of the United States which lie directly south of townships 3 and 4, in range 4 east, lying along the streams of Squaw Creek and Spanish Creek and the upper West Gallatin River, in Gallatin County, Mont. That said lands were 10 miles south of the surveyed lands, and extending along said streams for a distance of 30 miles; and that between said dates defendants cut, carried away, and converted to their own use about

4,700,000 feet of pine and fir and other kinds of timber, standing and growing upon said lands. The defendant claimed that he cut the timber under a contract with the Northern Pacific Railroad Company for the purpose of furnishing said company logs, railroad ties, bridge timber, and other timber for the construction of its railroad from the Yellowstone River in Montana Territory to the Mullan Pass in said Territory; and that the lands from which said timbers were cut were adjacent to the line of said railroad between said points. The United States replied to the new matter set up in the amended answer, denying that the timber cut and taken from the land mentioned in the complaint was cut or taken for the construction of any railroad adjacent to said lands; and denied that all of said timber was taken by said defendants or used for the construction of any railroad; and denied that the timber used in the Northern Pacific Railroad, and furnished by the defendant Linde, was used on that railroad or any railroad adjacent to the lands where the timber was cut. The defendant moved the court for a judgment on the pleadings, which motion was granted.

The whole question in that case turned upon the sufficiency of the reply. The defendant having alleged in his answer that the lands from which the timber was cut were adjacent to the line of road of the Northern Pacific Railroad Company. The court held that the reply of the United States

did not amount to a denial that the lands from which the timber was cut were adjacent lands within the meaning of the act of March 3, 1875. The court said:

> There being no denial in the replication but that the land from which the timber was cut *was adjacent* to the railroad, the denial that it was used in the construction of the railroad adjacent to such land raises no issue.

The court, therefore, held that the district court of the third judicial district of the Territory of Montana was right in granting the motion of the defendant for judgment on the pleadings in his favor.

United States v. Stone, 64 Fed., 667.

This case was decided by the circuit court of appeals for the ninth circuit on the 2d of October, 1894.

It appears from the record in that case that the timber was cut from land along the line of the Northern Pacific Railroad, *about 50 miles distant from the eastern end of the other roads*, which was the nearest point where available timber could be found. The trial court instructed the jury that such lands were not adjacent to the railroad company's right of way within the meaning of the act of Congress of March 3, 1875. The circuit court of appeals, in affirming the judgment of the circuit court for the district of Washington in that case, said:

> We are of opinion that under the facts presented in this case it could not fairly be said, under any reasonable construction of the language of the act, that the timber was taken from lands "adjacent to the line" of either of the roads in the construction of which it was used; that the court did not err in excluding the evidence of defendant's agency, and that the charge of the court, withdrawing this question from the jury, was not erroneous.

This case was subsequently taken to this court upon a writ of error.

Stone v. United States, 167 U. S., 178.

This court, in affirming the decision of the circuit court of appeals for the ninth circuit, speaking through Mr. Justice Harlan, used the following language with reference to the meaning of the word *adjacent* as used in the act of Congress of March 3, 1875 (p. 189):

> By the act of March 3, 1875 (18 Stat., 482, c. 152), Congress granted the right of way through the public lands of the United States to any railroad company duly organized under the laws of any Territory, except in the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same, to the extent of 100 feet on each side of the central line of the road, "also the right to take from the public lands adjacent

to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad."

At the trial the defendant offered as evidence the appointment of the plaintiff in error, John H. Stone, as agent of the Central Washington Railroad Company and of the Spokane and Palouse Railway Company, claiming that said corporations, having been organized under the laws of the Territory of Washington and having filed their articles of incorporation and proofs of organization with the Department of the Interior, which had approved the same, were authorized by the laws of the United States to take the timber included in this action, and such taking by them through their agent was not unlawful, the proof showing "that the ties which are sued for in this action were used by the said railroad companies in the construction of their said roads." This evidence was excluded, and its exclusion is assigned for error. It appears from the record, as stated in the opinion of the circuit court of appeals, that no timber fit for ties was found along the line of either of these roads; that both of them penetrated a barren region almost entirely destitute of timber, and that the timber was cut from lands along the line of the Northern Pacific Railroad about 50 miles distant from the eastern end of the other roads, which was the nearest point where available timber could be found.

The trial court, in its charge, thus interpreted the above act of 1875: "The act of

Congress under which this claim is made does not undertake to provide the materials necessary for the building of railroads. It does not provide that if there is not any timber convenient, or within a convenient distance to the building and construction of a new railroad, that the railroad company has a right to require the United States to provide them with material, or go upon distant lands and procure the material that they require. That is not the scope of the law, and so I have decided that adjacent lands means lands in proximity, contiguous to or near to the road, and that lands so far distant from the railroad and mentioned as lands in Kootenai County, Idaho, where it is claimed that railroad ties were cut, were not adjacent lands within the meaning of the law. That takes the whole question and the whole subject-matter of that claim from your consideration and releases you from any consideration in regard to it."

We concur with the circuit court of appeals in adjudging this to be a sound interpretation of the act of 1875. It is substantially the view expressed in *Denver and Rio Grande Railroad* v. *United States* (34 Fed. Rep., 838, 841), in which Mr. Justice Brewer said: "I certainly do not agree with the idea, which seems to be expressed elsewhere, that the proximity of the land is immaterial, or that Congress intended to grant anything like a general right to take timber from public land where it was most

convenient. The grant was limited to adjacent lands, and I do not appreciate the logic which concludes that if there be no timber on adjacent lands the grant reaches out and justifies the taking of timber from distant lands—lands fifty or a hundred miles away." Under this interpretation of the act of Congress, and under the facts of this case, it is clear that the timber was not taken from lands which, within the true meaning of that act, were adjacent to either of the roads in the construction of which it was used.

Bacheldor v. United States, 83 Fed., 986.

The decision in this case was rendered by the circuit court of appeals for the eighth circuit on December 13, 1897, about seven months after the decision of the Stone case (*supra*) by this court. But inasmuch as no reference is made to the Stone decision *in this court* by Judge Thayer in delivering the opinion of the circuit court of appeals in the Bacheldor case, it would seem that the decision in the Stone case *in this court* had escaped the notice of the circuit court of appeals.

The sole question presented by the record in the Bacheldor case was the meaning of the word *adjacent* as used in the act of Congress of June 8, 1872, which authorized the Denver and Rio Grande Railroad Company to take timber and materials for construction purposes from the public lands

adjacent to its line. The evidence in the case was that the timber in question was cut from land 21½ miles distant from the line of the Denver and Rio Grande Railroad, or about 25 miles distant therefrom by wagon road, and there was no timber nearer than that which had been taken on either side of that part of the road.

On the trial of the case the lower court instructed the jury, in substance, that the word or term "adjacent," as used and applied in the act of Congress referred to, meant the tier of townships lying adjoining on either side of the townships upon or through which the line and right of way of the Denver and Rio Grande Railroad runs; that, when the public lands are unsurveyed, the word "adjacent" meant relatively the same thing, as to limit of distance from the line or right of way; and that the word "township," as used in the court's instruction, meant an area of land 6 miles in extent north, south, east, and west, and was a legal subdivision, according to the official surveys, under the laws of the United States.

It appeared that the timber which had been cut by the defendant was outside of the limit of distance from the right of way that was defined by the court, and the defendant was convicted, and on appeal taken to the supreme court of New Mexico the appeal was affirmed by a divided court. (48 Pacific Reporter, p. 310.)

The circuit court of appeals for the eighth circuit, speaking through Thayer, circuit judge, said (p. 988):

> The use of the word "adjacent" is of much significance, and renders it necessary in all cases to consider, in the first instance, whether the land from which timber has been obtained for the construction of a railroad is near to or remote from the right of way. The inquiry whether it has been transported a considerable distance, or only a few miles, is always an important consideration. Probably no better or more reasonable test can be applied than that which was first suggested by Judge Hallett in *United States* v. *Denver & R. G. Ry. Co.* (31 Fed., 886, 889), namely, that timber should be regarded as adjacent to the right of way of a railroad, without reference to township or section lines, if it is within reasonable hauling distance by wagon. It is generally the case that timber suitable for railroad construction will not bear transportation by wagon from points remote from the established line of road, by reason of the expense incident to transporting it. If railroads, therefore, are limited in their right to take timber from the public domain to such timber standing on either side of their rights of way, as they can reasonably afford to haul by wagon from the place where it is cut, it is probable that they will realize the full benefit of the privilege which Congress intended to confer, and that the privilege will

not be abused. In a case which presents conditions like the one at bar, and in others which may arise, no court can say, as a matter of law, that a trespass was committed, because the timber was taken from a place 25 miles distant by wagon road from the defendant's right of way; but it should be left to a jury of the vicinage to determine, under instructions from the court such as we have substantially outlined, whether the right accorded by the statute was fairly exercised as Congress intended it should be or whether, by reason of the distance from which the timber in question was drawn, the defendant should be regarded as a trespasser. The judgment of the territorial court for the first judicial district of the Territory of New Mexico, and the judgment of the supreme court of the Territory of New Mexico as well, are both reversed, and the case is remanded to the territorial court for the first judicial district of said Territory for a new trial.

From this review of the Federal decisions it will be seen that this court has, in effect, held that lands situated 50 to 100 miles distant from a railroad company's right of way are not adjacent lands within the meaning of the law, while on the other hand the circuit courts of appeal for the eighth and ninth circuits have held that lands lying at a distance of 17 to 25 miles from a railroad company's right of way are adjacent lands within the

meaning of the law. The case at bar clearly presents to this court for the first time the question whether these decisions of the circuit courts of appeal for the eighth and ninth circuits are correct, and whether it can be said as a matter of law or fact that under even the most liberal interpretation of this statute, lands lying at so great a distance from a railroad company's right of way can be held to be *adjacent* lands within the meaning of the act of March 3, 1875.

The Government maintains that inasmuch as the precise meaning of this term as used in the statute is uncertain, it was the duty of the Land Department of the Government, having in charge the public lands of the United States, to place a reasonable interpretation upon the statute, and that this having been done in 1887 by Secretary Vilas, in which he held that two miles on either side of the railroad company's right of way embraced what should be understood as adjacent lands within the meaning of this law, that such interpretation being reasonable and sufficient to afford the railroad companies all the rights and privileges intended to be conferred upon them by the act of Congress above mentioned, that the courts will be reluctant to declare in favor of a larger and more extended interpretation of the law.

It also appears from the various decisions that the different courts have placed different interpretations upon the meaning of this phrase, some of the trial courts following the interpretation

and ruling of the Secretary of the Interior, while others have accepted a larger subdivision, to wit: townships, as including lands which may be said to be properly adjacent to the right of way, thus clearly showing that in the opinion of many the Secretary was right in his construction of the law; and on the other hand, one court (Judge Hoyt, in 29 Albany Law Journal, 24), I believe went to the extent of holding that lands 100 miles distant from the right of way should be considered within the idea of adjacency.

The circuit courts of appeals, however, in the two cases mentioned—the Bacheldor case and the case at bar—have held that the railroad companies were entitled to pass over three or four townships and cut timber from the public lands of the United States under the protection of this law. It seems to us that there can be no difference in principle between lands lying 25 miles and lands lying at a distance of 50 miles from the company's right of way, and that the mere fact that the timber can be hauled such distance at a profit, and that the lands from which the timber is cut is directly benefited by the construction of the road, are immaterial considerations.

JUDGE HALLETT'S REASON NOT APPLICABLE TO CASE AT BAR.

The reason assigned by Judge Hallett in the case of *United States* v. *Denver and Rio Grande Railroad Co.* (31 Fed., 886), and which has been referred

to very frequently in subsequent cases, is, that if the lands are so situated with reference to the right of way that the timber is *in ordinary hauling distance*, in such case the lands should be considered as adjacent to the right of way. It does not appear in this case that the timber was *within ordinary hauling distance*. It may have been an extraordinary haul, and still could have been hauled at a profit. It can hardly be contended that a haul of from 20 to 25 miles is within ordinary hauling distance. Such a haul is extraordinary, as the facts in this case tend to show. The greater portion of the timber, it is admitted, was rafted down the river to the company's right of way, and the remaining portion hauled by wagon. The fact that it is stipulated that the lands were materially and directly benefited should not be of controlling importance in this case, for it may be that lands hundreds of miles distant from a railroad might be so benefited, and yet in no sense would they be adjacent.

LENGTH OF DEFENDANT'S LINE OF ROAD.

In considering whether lands are adjacent to a particular railroad right of way, the length of the road might properly be considered. In this case we have a railroad scarcely 40 miles in length, and the assertion on the part of the railroad company of the right to cut timber from public lands throughout a tract of country 6 miles greater in breadth than the road extends in length, upon the

theory that all of such lands should be considered as adjacent lands within the meaning of the law. While it can not be maintained for a moment that the meaning of the word "adjacency" expands so as to embrace lands more remote from the railroad company's right of way, as the length of the road increases, it seems but fair to say that with reference to a road of this length, at least, lands 23 miles distant from the road by air line ought not to be regarded as within the idea of adjacency.

III.

STATE AUTHORITIES.

The word "adjacent" has received consideration at the hands of various State courts, but those authorities furnish us but little aid in construing the statute under discussion, for the reason that either the cases have not received very careful consideration upon this particular question, or have turned upon the peculiar state of facts presented. Of course all courts have held that the word *adjacent* means *near to* in *the neighborhood of*, or *at a convenient distance from*, some particular object. I shall, therefore, simply cite these cases, referring to only one or two as throwing some light upon the question here under discussion.

STATE CASES.

Henderson v. *Long*, 1 Cook, Tenn. (128).

Henderson v. *Long*, 11 Fed. Cases, 1084, No. 6354.

New York v. *Hartford*, 16 Hun., N. Y., 380.

Miller v. *Cabell*, 81 Ky., 184.

Camphill Borough, 142 Pa. State, 517.

In re Municipality for Opening Roffignac Street, 7 La., 76.

People v. *Schermerhorn*, 19 Barber, N. Y., 556.

People v. *Land Office Commissioner*, 135 N. Y., 447.

Saunders v. *N. Y. Central R. R. Co.*, 135 N. Y., 613.

Clapton v. *Taylor*, 49 Mo. Appls., 118.

Carrier v. *Schoharie Turnpike Co.*, 18 Johns, N. Y. 57.

Continental Imp. Co. v. *Phelps*, 47 Mich., 300.

Brooklyn R. R. Co. v. *Brooklyn*, 18 N.Y. Suppl., 876.

Kent v. *Perkins*, 36 Ohio State, 639.

In the case of the *Continental Imp. Co.* v. *Phelps* (*supra*), the facts were substantially as follows:

On the 29th of April, 1871, the improvement company was occupying and using the road of the Grand Rapids and Indiana Railroad Company, and Mr. Phelps was owner and proprietor of 160 acres lying away from the railroad and separated from it by a quarter section of uninclosed lands. He lived about a mile and a half from the railroad and owned no land situated nearer to it than the 160 acres just mentioned. There was no fence or other obstruction sufficient for partition fences on either side of said railroad. On the day mentioned a yoke of oxen, the property of Mr. Phelps, strayed

on the track, and in the evening a passenger train encountered them on it, away from a highway crossing, and ran against and so injured them that they were worthless, and one died soon after and the section foreman killed the other.

> By act No. 33 of the session of 1869 (Laws 1869, vol. 1, p. 49), to amend section 43 of the general law of 1855, the duty to construct fences was enjoined, and neglect was visited with liability in favor of persons damnified, without reference to whether their possessions bordered on the railroad or not; and this regulation was in force when the cattle were killed on the 29th of April, 1871, unless it was done away with by the law of 1871, which took effect on the 18th of April, or eleven days before the accident. By the act last mentioned (Laws 1871, vol. 1, p. 328), "to revise the laws providing for the incorporation of railroad companies," the duty to fence was equally imposed; but instead of making the liability of neglect the subject of an action by any person suffering loss, without regard to whether their places did or did not adjoin the railroad, as was done by the act of 1869, it extended the liability no further than to a specific class, namely, to "*adjacent occupants or proprietors.*"

It therefore became pertinent for the court to determine whether within the meaning of the act of 1871 Mr. Phelps was an adjacent occupant or proprietor. And it was held by the court that he was not.

In the case of *Henderson* v. *Long* (*supra*) the circuit court for the eastern district of Tennessee in 1812 had occasion to construe an act of the legislature of North Carolina, which directed that the lands in controversy should lie adjacent to the military boundary line. It was surveyed 10 or 15 miles from the boundary line. The court said:

> The North Carolina legislature authorized Alexander Martin, under whom the lessor of the plaintiff derives title, to enter 2,000 acres of land *adjacent* to the military boundary. It does not seem to the court that the legislature intended by this expression to compel Martin to adjoin the line. *Adjacent*, strictly speaking, does not mean *adjoining;* it means that it shall be *in the neighborhood*, or *convenient*, or *near to* the place mentioned in the act. The act did not make a location of the land; it only in substance required that when it was made it should lie *near to* the military boundary line.

ENGLISH CASES.

Kimberley Water Works, *appellant*, v. *De Beers Consolidated Mines*, *respondents*, 66 L. J. P. C., 108.

Birmingham v. *Allen*, 46 L. J. C. H., 673.

Darley Main Co. v. *Mitchell*, 11 Appls. cases, 142.

Rex v. *Hodgkins*, M. & H., 341.

Regina v. *Brown*, 17 Q. B., 839.

In the *Kimberley Water Works Company* v. *De Beers Consolidated Mines* (*supra*), the precise ques-

tions involved arose on the construction of an agreement made in 1888 between the Kimberley Water Works Company and the De Beers Consolidated Mines. The second clause of the agreement was as follows:

> That the said Kimberley Water Works Company (Limited) shall, from and after the first day of December, eighteen hundred and eighty-eight, supply and continue to supply the mining companies and persons engaged in mining the Kimberley and De Beers mines with water for their mining purposes at the price of eight pence per one hundred gallons, and shall from time to time as any mining companies or mining properties in the Dutoitspan or Bultfontein mines, or mines *adjacent thereto*, are acquired by purchase, hire, or otherwise, or become amalgamated with the De Beers Consolidated Mines (Limited), supply and continue to supply such companies and properties with water for their mining purposes at the price of eight pence per one hundred gallons.

In December, 1891, the De Beers Consolidated Mines purchased a farm upon which there was a mine called the Premier Mine. Large quantities of underground waters accumulated in the said mine. The De Beers Consolidated Mines claimed a right under the proviso of section 6 of the agreement to use for mining purposes the water made by the Premier Mine. This mine was situated *about 4 miles distant from the De Beers Mine*, and

was outside the municipality of Kimberley. While it was not argued on behalf of the De Beers Consolidated Mines that the Premier Mine was "adjacent," within the meaning of the second clause of the agreement, Lord Morris, in delivering the judgment of their lordships, said:

> Paragraph 2 contemplated the purchase of mines by the respondents, and, although *the Premier Mine is not adjacent, within the meaning of paragraph 2*, and the appellants consequently are not bound to supply it, by paragraph 6 the respondents are entitled to obtain all water from the mines, and there is no limitation of "the mines" to the mines in existence at the time of the agreement.

While none of these cases are of much assistance in ascertaining the precise meaning of the word *adjacent*, as used in the act of Congress of March 3, 1875, they nevertheless serve to illustrate and emphasize the fact, which must be apparent, that the word *adjacent*, when used in any particular context, must receive a reasonable construction and one which will protect the interests of all parties concerned. It does not mean that a license is thus given to put such a construction upon the word as would embrace matters not reasonably contemplated by the parties. And while it is a term which is susceptible of different constructions and may, under the particular facts in each case, convey to different minds different ideas as

to distance, the idea conveyed must in every instance be that of "proximity" or "nearness," that which is far distant or remote being necessarily excluded.

CONCLUSION.

If the lands from which the timber which is the subject of this suit were adjacent to the right of way of the St. Anthony Railroad within any fair and reasonable interpretation of this law, it is far from the purpose of the Government to seek to deprive the company of the benefits of the act. The Government seeks at the hands of this court a decision which will serve as a guide in future cases to the Land Department in determining how far a railroad company may with propriety go from its line of road upon the public domain and cut timber for use in the construction of its road and still claim the protection of this act of Congress. The question at the present time is involved in great obscurity, and depends for its interpretation upon the various conflicting decisions of the courts. The Land Department and several of the Federal courts, have spoken in favor of a comparatively narrow belt of land upon either side of the right of way as the only lands within the idea of adjacency. This court, in one of its decisions, has strongly intimated that it favors such an interpretation of the law. The decisions of the circuit courts of appeal, however, have, in

our opinion, included lands at such a great distance and so remote from the right of way as to give little, if any, effect to the plain, ordinary, and manifest intention of the law.

We assert, in conclusion, that if a railroad company be permitted to appropriate timber from the tier of sections lying on either side of its right of way, and embracing a belt of land 2 miles in width, that all the benefits intended to be secured to such railroad company by this act of Congress would be realized; but in order to give to railroad companies the benefit of any doubt, the Government is willing to concede that a railroad company may cut timber under the protection of this law from the second tier of sections, thus embracing a belt 4 miles in width, which, in our judgment, will secure to the railroad company every possible right contemplated by the law. Such concession would permit the defendant in error to cut timber from public lands of the United States embracing an area of 160 square miles, or more than one hundred times greater in extent than the tract of land granted to the railroad company for a right of way. Can any concession be more reasonable? The defendant in error, under the facts in this case, in effect claims the privilege of cutting timber upon public lands embracing an area of 1,840 square miles, or more than twelve hundred times greater in extent than the lands granted to the company for the purpose

of constructing its road. We submit that such claim is unreasonable and not within any fair interpretation of the act, and that this court should say, as a matter of law, that the public lands from which this timber was taken by the railroad company and its agents were not adjacent public lands.

Respectfully submitted.

MILTON D. PURDY,
Assistant Attorney-General.

O

Supreme Court of the United States

OCTOBER TERM, 1910.

No. 157.

THE UNITED STATES,
Plaintiff in Error,

vs.

THE ST. ANTHONY RAILROAD CO.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE ST. ANTHONY RAILROAD COMPANY.

P. L. WILLIAMS,
Attorney for Defendant.

Supreme Court of the United States.

OCTOBER TERM, 1908.

No. 147.

UNITED STATES,
Plaintiff in Error,
vs.
THE ST. ANTHONY RAILROAD COMPANY.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS, NINTH CIRCUIT.

BRIEF FOR THE ST. ANTHONY RAILROAD COMPANY.

STATEMENT OF THE CASE.

This is an action brought by the United States against the St. Anthony Railroad Company, a corporation of the state of Idaho, to recover the value of 1,702,000 feet of timber of the alleged value of $12.35 per thousand feet, and also for the value of 225,000 feet of the by-product of lumber manufactured from

the trees and timber which it is alleged the defendant in error unlawfully cut upon the unsurveyed public lands of the United States, and which lands it is alleged would be, when surveyed, in Township 9, Ranges 42, 43 and 44, East of the Boise Meridian, Township 18, Ranges 41, 42, 43 and 44 east of the said Meridian, and situated in Fremont County, in the state of Idaho, and in Townships 2 and 3 North, Range 42 East of said Meridian, situated in Bingham County, in said state of Idaho, and all in the Blackfoot Land District, the whole of said timber being as alleged, of the aggregate value of $21,469.70, and judgment for that sum, with legal interest, demanded.

The defendant in error by its answer admitted its corporate existence, as alleged, and that the United States was the owner of the lands described in the complaint. It denied that it unlawfully entered upon the lands mentioned or unlawfully felled or cut the timber or trees, or wilfully took or carried the same away, or wilfully converted to its use the said timber and lumber, and further denied that it felled or caused to be felled or appropriated or converted to its use any trees or timber of any amount or value except as in said answer expressly admitted.

For an affirmative defense the defendant averred that it was duly incorporated under the laws of the state of Idaho, on the 18th of May, 1899, for the purpose of constructing, owning, maintaining and operating a steam railroad from the town of Idaho Falls, in Bingham County, Idaho, to St. Anthony, in Fremont County, in said state, a distance of about forty miles. That on July 7th, 1899, the said company adopted the

route for its proposed railway as the same had been theretofore surveyed and located by its engineer, which line was shown upon maps then presented, and which is the same line and right of way upon which the defendant's railroad was afterwards actually built, and which it is now actually maintaining and operating.

It is further alleged that the said right of way so adopted passed through and over public lands of the United Stated, and that on or about July 7, 1899, the defendant caused to be filed in the local Land Office, at Blackfoot, Idaho, a copy of its articles of incorporation and due proofs of its organization, and also maps of its said right of way, together with certificates and affidavits in due form as required by law and the rules and regulations of the General Land Office. That said papers and maps were thereafter forwarded to and filed with the Secretary of the Interior, at Washington, on or about July 19th, 1899, and by him approved October 4th, 1899, and that defendant performed all things required of railroad companies by the Act of Congress granting to railroads the right of way through the public lands of the United States, approved March 3rd, 1875, and it thereby became entitled to the benefits and privileges therein granted to railway companies.

The defendant further alleged in its said answer that for the purpose of procuring the necessary material with which to construct its said railroad, it entered into a contract with the Thompson Mercantile Company, a corporation, of St. Anthony, Idaho, by the terms of which the said Mercantile Company was to furnish to defendant at the times and in the manner therein agreed upon, ties and timbers of dimensions

suitable for the construction of said railroad. That said timbers were to be used and were used solely for the purpose of the original construction of said railroad and the said Mercantile Company was by the express terms of said contract appointed the agent of the defendant, and in that capacity was authorized to cut timber for the said and no other purpose, upon, and to take the same from the public lands of the United States adjacent to the line of said railroad.

It is further averred that pursuant to the terms of said contract, and acting as the agent of defendant, the said Mercantile Company did enter upon the lands described in the complaint, the same being adjacent to the line of said railroad, for the purpose of procuring said ties and timbers, and did during the summer and fall of 1899 cut and remove of the trees and timber growing upon said lands, not to exceed 1,682, 975 feet, and did deliver the same to the defendant along the line of its said railroad, to be, and the same was used in the original construction of said road. That said timber was cut from the nearest timber-bearing public lands to said line of road, and were and are adjacent thereto. That all of said ties and timbers were necessary for the original construction of said road and were used for that purpose, and the defendant entered upon said lands through its said agent and cut and removed said timber and trees in good faith, with no intention of violating any law or committing any trespass, but believing that it had the right so to do, and if in so doing it has done any wrong, the same was not willful or intentional, but was due to inadvertence and mistake. That said timber as it stood upon said lands

when defendant caused the same to be cut, was not of the value to exceed one dollar per thousand feet, nor were said ties and timbers worth to exceed said amount per thousand feet, at the time this suit was commenced, after deducting defendant's reasonable expenses in causing said ties and timbers to be cut, sawed and delivered to and upon its said line of road.

The case was tried upon an agreed statement of facts, to the following effect:

1st. That the allegations contained in the complaint and not denied in the answer, are true.

2nd. That the amount of timber and lumber cut and taken by defendant is correctly stated in its answer. That the lands upon which the same was cut are correctly described in the complaint and were and are unoccupied, unentered public lands of the United States. That said timber was cut and carried away at the time stated in the complaint, and its value upon delivery to defendant was as alleged in the complaint.

3rd. That paragraphs (1), (2), and (3) of the affirmative part of defendant's answer are true.

4th. That paragraph (4) of said affirmative part of the answer is true, except the averment of value, the averment as to good faith and mistake, and the averment of "adjacency," and as to those matters it is agreed:

(a) That the value of said timber at the time and under the circumstances stated was $1.50 per thousand feet, instead of $1.00 as alleged;

(b) That as to the question of intent it is agreed that defendant did not act under a mistake of fact,—that is to say, defendant knew all the facts touching

the status of said timber on said lands and did what was done believing that it had the legal right so to do, such belief being based upon the advice of its counsel, an attorney of the said court, to the effect that it had such right. Defendant used ordinary care and prudence in first being advised as to the law, all the facts as they herein appear, relating to the status of said timber being known to said counsel, and there was no intention on the part of defendant to violate any law or do any wrongful act.

(c) Upon the issue of the "adjacency" of the lands upon which said timber was cut, to the railroad upon which it was used, it is agreed that the said lands were at the following distances, namely: From seventeen to twenty-three miles by air line; from twenty to twenty-five miles by wagon road; and from twenty-two to twenty-six miles following the sinuosities of the river upon which said timber was in part conveyed. By far the larger part of said timber was driven or rafted down said river from said lands to said railroad, the other part being hauled by wagon. The wagon road referred to and so used is an ordinarily good road, involves no unusual grades, and said timber could with reasonable profit be hauled by wagon from the place where it was cut to said railroad where it was used for ties and in the construction of bridges. It was further agreed that there were no other timber lands or suitable timber upon either side of said railroad as near as were the lands and timber in question, and that said lands are near enough and so located with reference to said railroad as to be directly and materially benefitted thereby.

Fifth. Upon the foregoing statement of facts, the following questions are to be submitted to the court for its decision:

(a) What are adjacent lands within the meaning of the Act of Congress of March 3rd, 1875, entitled "An Act granting to railroads the right of way through the public lands of the United States?"

(b) Whether said lands from which said timber was cut were adjacent to the said railroad within the meaning of said Act?

(c) Had said railroad company the right under said act to take from said lands the timber necessary for the construction of its said railroad?

(d) To what extent and for what amount is the said railroad company responsible for the timber cut as aforesaid, if at all?

(e) To what extent and for what amount is said railroad company liable, if at all, upon the above statement of facts and under the law as it shall be decided by the court?

That judgment should be entered by the court upon the foregoing statement of facts, and the law, as it should decide it. That admissions made in said statement of facts should bind the parties only for this suit, and not as to any other matter or case. Each of the statements of fact contained in the said stipulation was made subject to the objection of either party as to its relevancy or materiality.

The said case was submitted to the circuit court of the United States for the district of Idaho, upon the pleadings and said stipulation of facts, and judg-

ment was thereon rendered in favor of the defendant in said court, on the 23rd day of April, 1901. The opinion of United States District Judge Beatty in rendering said judgment is contained in the transcript of the record, pages 9 and 10.

Said case was taken upon writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, and that court affirmed the judgment of the court below, its opinion being contained in the transcript of the record on pages 15 to 18, and reported in 114 Fed. 722.

It is submitted that upon this record and the assignments of error, there are substantially but two questions to be determined, namely:

First: Were the lands upon which the timber was cut "*adjacent*" to defendant's line of road within the meaning of the Act of March 3rd, 1875?

Second: If not "*adjacent*," and therefore the defendant had no right to cut the timber, what rule of damages should measure the amount of recovery in this action?

ARGUMENT.

The part of the Act of March 3rd, 1875, material to this inquiry, is as follows:

> "That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any state or territory * * * which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of the organization under the same, to the extent of one hundred

> feet on each side of the central line of said road; *also the right to take, from the public lands adjacent to the line of said road, material, earth, stone and timber necessary for the construction of said railroad.*"
>
> 18 Statutes at Large, 482.

Contrary to the general rule of construction of land grants, we have the highest authority for a liberal construction of this Act in favor of the railway company.

Judge Deady (in U. S. vs Chaplin, 31 Fed. 890) discussing the general nature and spirit of the Act, speaks as follows at page 895:

"Before undertaking to interpret the language of the act in this connection, it is proper to consider its general nature and purpose. At first, the act is not a mere gratuity, but was evidently passed on the theory that it is for the interest of the grantor to promote the building of railways through the public domain. At its passage the United States was and still is the owner of millions of acres of wild and unsettled land. Congress intended to enhance the value and promote the settlement of these lands by inducing capital to build railways through them. The inducement is the right of way and the license to take material from the adjacent lands for the construction of the road."

This Court in the case of the United States vs. Denver & Rio Grande Railway Company, 150 U. S. 1, used the following language:

> "The general nature and purpose of the Act of 1875 were manifestly to promote the building of railroads through the immense public domain remaining unsettled and undeveloped

at the time of its passage. It was not a mere bounty for the benefit of the railroads that might accept its provisions, but was legislation intended to promote the interests of the government in opening to settlement, and in enhancing the value of those public lands through or near which such railroads might be constructed. To induce the investment of capital in the construction of railroads through the public domain, Congress had previously granted special rights, such as were conferred upon the defendant by the Act of 1872, but, by this Act of 1875, a general offer was made to any and all railroad companies of so much of the public domain as might be necessary for right of way, and ground adjacent thereto, for station buildings, depots, machine shops, side tracks, turnouts and water stations, with the right to take timber from the public lands adjacent to such road for the construction of the railway, provided such railway company should comply with the provisions of section four of the Act. * * *

When an Act operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a quasi public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. Bradley vs. New York & N. H. R. Co., 21 Conn. 294; Pierce, Railroads, 491.

This is the rule, we think, properly applicable to the construction of the Act of 1875,

> rather than the more strict rule of construction adopted in the case of purely private grants."

That this rule was once correct was practically conceded by plaintiff in error in the court below; but to avoid its application to the case at bar it was contended that we live in a new age and the old order of things has passed away; that formerly nearly all lands in the western states were Government lands, and that timber growing thereon was practically the only timber available for the construction of railroads; that if railroad companies had at that time to purchase timber, would have entailed enormous, if not prohibitory expense; and therefore (it seems) the courts were in order to further railroad building and thus subserve the public welfare, under the necessity of so construing the law as to efficiently meet the supposed emergency, regardless of what the law-makers actually intended. That now, it is thought by some, and the courts should adopt the conclusion, railroad construction is no longer urgently demanded by the public interests; that railroads are more able than formerly to buy timber, and there are many persons who have it to sell; that therefore (it would seem) the courts should repeal that portion of the law which under the guise of construction they enacted.

Either such was the contention of the plaintiff in error or it must be understood to mean that Congress intended to pass a certain law; that such intention and such law are correctly evidenced by the Act of 1875, as the same has been heretofore construed by the court; that, however, the continued existence of such a law in

such a form is detrimental to public interests; and that therefor the law as it exists must be amended, and in its effect curtailed by judicial construction. Thus, without the exercise of any function by the legislative department of the government, we should have one law for one decade and substantially a different one for another decade. Indeed the opinion in the United States vs. Railroad Company, cited supra, was written in October, 1893, and the timber now in question was cut in the summer of 1899, scarcely six years having elapsed.

We should thus have one law for Colorado and another law for Idaho; and it might be observed in passing that Idaho in 1899 had more of the frontier conditions, which it is argued justify a liberal construction, than Colorado had in 1893.

But we respectfully submit, the views advanced by the plaintiff in error in the Circuit Court of Appeals in this regard cannot find favor in this court. It is the function of the courts under approved principles of construction, to determine and define the intent and scope of the Act of 1875. It is conceded that that has been done. Changed conditions, if they exist, are not for the courts, but they appeal to the Legislature. Even granting that by reason of the changed conditions suggested, it is no longer a wise public policy "to furnish railroad companies the material from the public lands for use in the building of their roads." such argument cannot be urged upon the courts; that is a matter for Congressional consideration. Moreover, it is not so clear that public interests are suffering. It is possible that the same far-sighted wisdom

that brought forth this act, has left it upon the statute book. In United States vs. Railroad Company, supra, the Court states that the purpose of the Act was in a sense selfish and not merely to bestow a bounty upon railroad companies. It was intended to enhance "the value of those public lands through or near which such railroads might be constructed." Has not that very purpose been strikingly subserved in the present instance. These very lands from which the timber was cut were enhanced in value, to say nothing of the great benefit to vast tracts of other lands belonging to plaintiff in error. It is agreed in the stipulation of facts (Trans. of record top page 7), "*that said lands are near enough and so located with reference to said railroad as to be directly and materially benefitted thereby.*" It thus appears conclusively that timber in this instance was no more a mere gratuity or bounty than was timber used immediately after the passage of the Act in 1875 in the construction of railroads.

MEANING OF THE WORD "ADJACENT."

It is true that objects cannot be adjoining or contiguous or next to each other, without also being adjacent, but on the other hand, they may be adjacent and yet not be contiguous or adjoining, or next to each other. To say that contiguous objects are adjacent to each other is not a discriminating use of language. In other words, "*adjacent*," strictly speaking, means near to, but not necessarily touching.

> "Two or three lots of land might be described as adjacent to the first, while only the second could be said to be adjoining."
>
> Bouvier's Law Dict.

"What is adjacent may be separated by the intervention of some other object."

"What is adjoining or contiguous must touch."

Worcester's Dict.

"Things are adjacent when they lie close to each other, not necessarily in actual contact: as adjacent fields, adjacent villages, etc."

Webster's International Dict.

Illustration—"I find that all Europe with her adjacent isles is peopled with Christians."—Howell.

The Standard Dictionary gives as the first, and most approved definition of the word adjacent: "Lying near or close at hand."

The Encyclopædic Dictionary gives as its preferred defination. "Lying near to."

The word adjacent is compounded of *ad* and *jaceo*, to lie near. What is *adjacent* may be separated altogether by the intervention of some third object.

Illustration—"They have been beating up for volunteers at York and the towns adjacent, but nobody will list."—Granville.

Crabb's English Synonyms.

In the matter of Ward, 52 N. Y. 397, the Court of Appeals of New York says:

"The word 'adjoining' in its etymological sense, means touching or contiguous, as distinguished from lying near or adjacent."

In the instruction given by the trial court, and approved by the appellate court, in the case of the United States, vs. Stone, 64 Fed. 667; 167 U. S. 178, this larger meaning of the word is clearly preserved by the use of the disjunctive "*or*." To be "*adjacent*," the Court says, lands must be "in proximity to, con-

tiguous to or near to the road." If therefore, lands are contiguons, they are within the law, if on the other hand they are "near to the road" though not contiguous, they are equally within the law.

In view of these definitions of lexicographers, it is obvious that no fixed and mathematical definition of the word "*adjacent*" can be given. Indeed, it seems now to be the settled doctrine of the courts that the word as used in the Act of 1875 is and was intended to be flexible and incapable of exact or comprehensive definition. No decision which has attempted to prescribe a mathematical or invarible formula to be applied to all cases, has gone unchallenged in the appelate courts. The result seems to be that each case must be adjudged upon its own facts, and that under general instructions from the Court, "*adjacency*" is a question for the jury.

In the case of the United Sta'es, vs. D. & R. G. R Co., 31 Fed. 886, Hallett, J., says:

> "The word 'adjacent' seems to be of flexible meaning, and to depend very much upon the context and the subject-matter to which it may be applied for its proper effect. As used in these acts, and with reference to the lands which may be taken for stations, side tracks, etc., it has the sense of contiguous or adjoining, while in the preceeding paragraph, and with reference to material for building the road, it is claimed, and with reason, that it should have the larger sense of nearness without actual contact. In a standard dictionary an illustration of the larger meaning of the word is given in this form: 'Things are *adjacent* when they lie near to each other, without actually touching, as adjacent fields, adjacent villages,

> etc. * * * Accepting the larger meaning of the word, the right to take timber from the public lands, under these acts, extends naturally some distance from the right of way, and probably within ordinary transportation by wagon."

In United States vs. Chaplin, 31 Fed. 890, Deady, J., Says:

> "This material appears to have been taken from certain townships through which the road runs, and no question is made but that such lands are "adjacent" to the line of the road. What is "adjacent" land, within the meaning of the statute, must depend on the circumstances of each particular case. Where the "adjacent" ends and the non-adjacent begins may be difficult to determine. On the theory that the material is taken on account of the benefit resulting to the lands from the construction of the road, my impression is that the term "adjacent" ought not to be construed to include any land save such as by its proximity to the line of the road is directly and materially benefitted by its construction."

See also

United States vs. Lynde, 47 Fed. Rep., 297.

United States vs. N. P. R. R. Co., 29 Alb. L. J. 24; 1 Ency. Law (2nd Ed.) 633.

Perhaps the most recent case from a court of high authority is that of Bacheldor vs. United States decided by the Circuit Court of Appeals, Eighth Circuit, in December, 1897, and reported in the 83rd Federal Reporter, p. 986. The question now under consideration was the sole question involved in the case.

The evidence discloses that the timber in question

was cut from land twenty-one and one-half miles distant from the line of the Denver & Rio Grande Railroad, or about twenty-five miles distant therefrom by wagon road, and that there was no timber nearer than that which had been taken, on either side of the road.

The trial court instructed in effect that "adjacent" would not permit cutting to be done beyond the limits of townships contiguous to the right of way of the railroad.

Thayer, C. J., delivering the opinion of the court, says:

> "The case at bar is the first, we believe, in which it has been ruled that, under the act of June 8, 1872, timber cannot be taken from the public domain by the defendant company, for the purposes named in the act, unless it is taken from lands lying in the townships through which the road is located, or from lands lying in the tier of townships next adjoining said townships on either side. *If Congress had intended to limit the defendant's right to take timber and other materials, for the construction of its road, to the townships last aforesaid, it would most likely have so declared in plain language and thus have freed the act from all doubt and uncertainty as to its meaning. The fact that Congress did not do so when conferring the right in question, but used the word "adjacent," which is purely a relative term, and may be understood differently when applied to different objects or under different circumstances, is very persuasive evidence that Congress did not intend to fix an arbitrary line on each side of the defendant's right of way, beyond which the right to take timber and other materials should not extend. The use of the phrase "lands adjacent" to the right of way, instead of fixing a more precise limit, as might well*

have been done by reference to the public surveys, indicates, we think, that it was not the intention of Congress to confine the privilege in question to particular townships or sections lying along the right of way, but that its purpose was to leave the right to take timber and other materials to be governed by circumstances.

"Congress intended to offer substantial inducements for the construction of railroads in certain sections of the country where timber suitable for railroad construction was known to be scarce, and in many places distant from the lines of the road to be benefitted, as they would be projected and built. *For that reason it did not establish a fixed line on either side of the right of way, which, if established, would at times render the privilege of taking material valueless; but it chose to confer the privilege in such terms as would allow the land department, and courts and juries as well, some discretion in determining, under different conditions, what was a proper limit within which it might be exercised.* It accordingly authorized timber and other materials to be taken from adjacent lands, leaving those whose duty it would be to see that the right was not abused, but was exercised in a reasonable manner, to decide in any given case whether the land from which the material had been obtained was adjacent to the right of way, within the spirit and intent of the act. For these reasons we cannot approve of the instruction which was given by the trial court, because it contains a definition of the term 'adjacent,' which, in our judgment, was not contemplated by the lawmaker.

"Assuming, then, as above indicated, that in cases arising under the acts of June 8, 1872, and March 3, 1875, above cited, the question whether timber or other materials have been taken from lands adjacent to the right of way of a railroad, is usually a mixed

question of law and fact, and that it cannot always be decided as a pure matter of law, it becomes necessary to determine what is the proper test by which the question should be determined. It is obvious, we think, that Congress did not intend to grant a general right to take timber from any part of the public domain wherever it was most convenient to take it. The use of the word 'adjacent' is of much significance, and renders it necessary in all cases to consider, in the first instance, whether the land from which the timber has been obtained for the construction of a railroad is near to or remote from the right of way. The inquiry whether it has been transported a considerable distance or only a few miles, is always an important consideration. Probably no better or more reasonable test can be applied than that which was first suggested by Judge Hallett in U. S. vs. Denver & R. G. R. Co., 31 Fed. 886, 889, namely, that timber should be regarded as adjacent to the right of way of a railroad, without reference to township or section lines, if it is within reasonable hauling distance by wagon. It is generally the case that timber suitable for railroad construction will not bear transportation by wagon from points remote from the established line of road, by reason of the expense incident to transporting it. If railroads, therefore, are limited in their right to take timber from the public domain to such timber standing on either side of their rights of way as they can reasonably afford to haul by wagon from the place where it is cut, it is probable that they will realize the full benefit of the privilege which Congress intended to confer and that the privilege will not be abused. In a case which presents conditions like the one at bar, and in others which may arise, no court can say as a matter of law, that a trespass

> was committed because the timber was taken from a place 25 miles distant by wagon road from the defendant's right of way; but it should be left to a jury of the vicinage to determine, under instructions from the court such as we have substantially outlined, whether the right accorded by the statute was fairly exercised as Congress intended it should be, or whether, by reason of the distance from which the timber in question was drawn, the defendant should be regarded as a trespasser."

In the court below it was tacitly conceded by the plaintiff in error that the lands now in question are "adjacent" to the defendant's line of road within the principles of construction announced in these various decisions. It was also there conceded that the facts in the case of United States vs. Bacheldor were substantially identical with those here involved; if there are any material distinctions they are in favor of this defendant.

But it was further contended that these decisions were in conflict with, and overruled by, the decision of this court in the case of the United States v. Stone, 167 U. S., 178, and which affirmed the judgment of the Circuit Court of Appeals in the Ninth Circuit, and reported in 64 Federal, 667. If there is such conflict between the Bacheldor case and the Stone case it is indeed strange that it escaped the attention of the court of Appeals for the Eighth Circuit, for under the circumstances and in the light of the opinion in the Bacheldor case it is apparent that that court discovered no conflict. As observed in the opinion of District Judge Beatty in the Circuit Court for the District of Idaho (Trans. of record, page 10) when the Bacheldor deci-

sion was rendered the court must have been aware of the decision of the Supreme Court in the Stone case, which had been announced seven months before. But even if ignorant of the Supreme Court decision, it was familiar with the decision of the Circuit Court of Appeals in that case, and cites it. It does not criticise it, but on the contrary inferentially approves it. The court did not even see fit to attempt to distinguish the Stone case. There can be but one explanation, and that is that the court considered the Bacheldor case so unilke the Stone case in its facts that the latter was of little assistance in reaching a conclusion in the former, and that any effort to distinguish the two cases would be superfluous. An examination of the records in the two cases makes apparent the correctness of this view. It is to be borne in mind that the decision in the Stone case is expressly confined to the "facts" there "presented." No attempt is made to give the word "adjacent" a fixed or inflexible meaning of universal application. No criticism is made of the decisions theretofore rendered announcing general principles as guides in determining the question of "adjacency" in particular cases. Upon what facts or in what respect is there any analogy between the Stone case and the Bacheldor case? Granting the other facts to be analagous, does it logically follow that because fifty miles is held to be "*distant*" and not "*near to*" or "*adjacent,*" therefore twenty or twenty-five miles is also "distant?" Other features radically distinguish the two cases, but this alone would be sufficient. It is significant in this connection that in

Denver & Rio Grande Ry. Co. vs. U. S., 34 Fed. 841,

Judge Brewer, in suggesting what would be "*distant lands*" mentions "lands fifty or one hundred miles away" instead of lands twenty-five miles away. Nor does the general definition of "adjacent lands" as given in the Stone case bring it into conflict with the Bacheldor case. That lands to be "adjacent" must be in proximity or contiguous or near to the railroad is not a new doctrine, but has been conceded by nearly all of the courts. It is also conceded that a railroad has no right to go upon "distant lands" to cut timber. These general principles have almost without exception been uncontroverted. The difficulty has arisen and a diversity of opinion has resulted only when it came to determining in each particular case how many miles there should be between the "line of the road" and the line of separation between "adjacent" and "distant" lands. Upon this point the Stone case says only that "under the facts presented" in that case this line should not be a distance of fifty miles from the railroad. It is not suggested that twenty or twenty-five miles is too great a distance; nor is it even held that under no circumstances could lands fifty miles away be considered "adjacent."

Now, what essential features are there in common to the case at bar and the Stone case, that the latter should be held to control the former? The timber involved in the Stone case was for the construction of two railroads, the Spokane & Palouse Railroad and the Central Washington Railroad. These roads branch off from the Northern Pacific Railroad, one extending southwesterly and the other extending northwesterly at points on the Northern Pacific eight miles apart.

The timber in question was cut about fifty miles easterly from the eastern end of these branch lines and along the line of the Northern Pacific Railroad.

By reference to the transcript of the record for the facts in the case at bar, and comparing them with the facts in the Stone case, we have the following comparative statement of conditions, namely:

FIRST.—In the case at bar the timber was cut from 17 to 26 miles from the place where it was actually used in railroad construction. In the Stone case the timber was cut about fifty miles easterly from the easterly end of the railroads for the construction of which it was cut; and at various distances in excess of fifty miles from the points where it was used. The materialty of this distinction has already been commented on.

SECOND.—In the case at bar the lands from which the timber was cut were near enough and were so located with reference to the railroad under construction as to be directly and materially benefitted thereby. The fundamental purpose of the Act of 1875 was being fulfilled by the construction of this road; these public lands were being enhanced in value; the plaintiff in error was upon the agreed facts shown in the record, receiving a valuable return for the timber taken. In the Stone case the roads under construction could certainly benefit the lands from which the timber was taken only in the most indirect way, if at all. The region where the timber was cut had already been penetrated by a railroad along the trunk line of which the lands lay. Situated as they were fifty miles from the termini of these branch roads, it is difficult to see,

and it certainly does not appear from the record what material advantage would accrue to them by reason of the construction of these roads.

THIRD.—In the case at bar the timber could with reasonable profit be hauled by wagon from the place where it was cut to the place where it was used. That is, it was not very near to any other railroad, and it was not very far from this one. In the Stone case it is apparant that such was not the case. The lands were situated too near a line of railroad in operation to permit a profitable wagon haul for a distance necessarily of at least fifty miles. The principle involved in this distinction first announced by Judge Hallett in United States vs. Denver and Rio Grande Ry. Co., 31 Fed. 886, and favorably regarded by other courts, was criticised by the plaintiff in error in the court below as wholly arbitrary, but we submit that this characterization is not justified. That case also had for its basis the primary purpose and intent of the Act of 1875, which was to open for settlement and enchance the value of public lands by making them commercially accessable through the construction of railroads. It is evident that lands from which timber could be profitably hauled by wagon for railroad construction, must under no circumstances be very far distant from the line of such road, and it is also obvious that as a rule such lands do not lie near a constructed railroad; that they lie in a region not yet penetrated by railroad construction; that for the purpose of making them practically accessible for settlement and of making them available, railroad construction is necessary; that, in

short, as to such lands the purpose of the Act of 1875 has not yet been fulfilled.

In view of these distinguishing featurers, it is pertinent again to inquire how or why the Stone decision should be held to conclude this defendant. In distance, this defendant went less than half as far as Stone. In the Stone case neither the Circuit Court of Appeals nor this court attempted to lay down any general rules or criticise any rule theretefore laid down by other courts and followed by this defendant. The facts being essentially different, what principle, doctrine, rule or suggestion is there in the Stone case by which the facts in this case are to be controlled?

If rules heretofore announced and never yet criticised by courts of authority are to be deemed arbitrary and not founded on reason, what rule or principle shall guide us in determining whether or not to accept the inducement supposed to be offered by the Act of 1875? Granting that "contiguous" is safe, and fifty miles is unsafe, where between these limits is the danger line? Is there no chart, compass or guide? Plaintiff in error suggests none, and we submit that while possibly not in themselves conclusive, practicability of wagon haul and direct benefits to lands, are important conditions to be considered in determining the question of "adjacency," and we further respectfully submit that there is no conflict between the Stone case and the Bacheldor case, and that the latter contains a correct exposition of the law as applicable to the facts herein involved.

MEASURE OF DAMAGES.

In view of the law as above cited, discussion of the rule of damages seems almost superfluous.

But should it be held that the lands were not "adjacent," still we contend that plaintiff should recover only for "stumpage" value, namely, at the rate of $1.50 per thousand feet.

Prior to the decision in Woodenware Co.. vs. U. S., 106 U. S. 432, there was much conflict of authority upon the question whether or not the amount of recovery should under any circumstances exceed the stumpage value. But the rule established by that case is, as we understand it, as follows: (1.) When the defendant is a knowing and willful trespasser, the full value of the property at the time of bringing the action, with no deduction for his labor and expense; (2.) When the defendant is an unintentional or mistaken trespasser, the value at the time of conversion, less the amount which such trespasser has added to its value.

We contend that if defendant in this case is a trespasser at all, it is of the second class.

In a sense it made no mistake as to facts. That is to say, defendant knew that this timber was upon the lands of plaintiff, and the distance of the lands from its right of way, and the other particular facts and circumstances. But if the question of "adjacency" is a mixed question of law and fact, and it should finally be held that defendant is a trespasser, then clearly defendant acted under a mistake of both law and fact. It is clear that it did not act rashly, or carelessly, or indifferently. It is expressly stipulated that it acted

in good faith and exercised ordinary care and prudence in an honest endeavor to learn the extent of its rights. It intended no wrong, it concealed no facts it relied upon and followed competent advice.

Under the circumstances, were the mistake merely and purely one of law, the conclusion must be the same. It is no answer to say that ignorance of the law excuses no one. Defendant is not seeking to be excused. If it made a mistake it should and is willing to suffer the legitimate, natural consequences. That is, simply to fully compensate the wronged party for his loss. In this case the actual loss of the plaintiff is measured by the value of timber taken, as it stood upon the ground at the moment of the taking.

But we contend the circumstances of the case and the conduct of the defendant do relieve it from punitive damages—and the first rule above stated is essentially punitive in its nature. Primarily it is invoked not for the purpose of making the plaintiff whole, but to punish the defendant and to deter others from like conduct.

Defendant's conduct was not reprehensible, and should not be punished. It took all reasonable precaution. Its only alternative was to abandon what it had reason to believe was its rights. To impose a severe penalty on such conduct would result in the assertion by railroad companies of their right to cut timber only in the clearest cases, thus discouraging in many regions the very enterprise which the Act in question was intended to promote.

It is not necessary that the mistake be concerning probative or even ultimate facts.

If each of two men claimed to be the owner of a horse running in the pasture, and there was no dispute as to the facts, but only a difference of opinion between them and their respective counsel as to the legal effect of the facts, and one of them openly, in good faith, and pursuant to the advice of his attorney, took the animal and converted it to his own use, would not the measure of damages be the value of the animal at the time of its conversion without any penalty, should the other claimant sue and be successful in establishing his title? There was a mistake of law simply, but it involved an honest mistake as to true ownership.

So here, granting that there was a mistake, and it involved only the law, yet there was an honest mistake as to the real ownership of so much of the timber as was necessary to construct defendant's road. It belonged to the plaintiff until defendant complied with the Act of 1875, and thereupon defendant in good faith and reasonably believed that ownership was transferred to it by the terms of the general grant.

The rule as announced by the court in Woodenware Co. vs. U. S., supra., must be read in the light of the principles upon which it is expressly based.

The court says:

> "We cannot follow counsel for the plaintiff in error through the examination of all the cases, both in England and this country, which his commendable research has enabled him to place upon the brief. In the English courts the decisions have in the main grown out of coal taken from the mine, and in such cases the principle seems

to be established in those courts, that when suit is brought for the value of the coal so taken, and it has been the result of an honest mistake as to the true ownership of the mine, and the taking was not a wilful trespass, the rule of damages is the value of the coal as it was in the mine before it was disturbed and not its value when dug out and delivered at the mouth of the mine. Martin vs. Porter, 5 Mees. & W., 351; Morgan vs. Powell, 3 Ad. & El. (N. S.), 278; Wood vs. Morewood, 3 Ad. & El., 440; Hilton vs. Woods, L. R. 4 Eq., 432; Jegon vs. Vivian, L. R., 6 Ch. App., 742.

"The doctrine of the English courts on this subject is probably as well stated by Lord Hatherly in the House of Lords, in the case of Livingston vs. Rawyards Coal Co., 5 App. Cas., 25, as anywhere else. He said: 'There is no doubt that if a man furtively, and in bad faith, robs his neighbor of his property, and because it is underground is probably for some little time not detected, the court of equity in this country will struggle for, or, I would rather say, will assert its authority to punish the fraud by fixing the person with the value of the whole of the property which he has so furtively taken, and making him no allowance in respect of what he has so done, as would have been justly made to him, if the parties had been working by agreement.' But 'when once we arrive at the fact that an inadvertence has been the cause of the misfortune, then the simple course is to make every just allowance for outlay on the part of the person who has so acquired the property, and to give back to the owner, so far as is possible under the circumstances of the case, the full value of that which cannot be restored to him in specie.

"There seems to us to be no doubt that in the case of a willful trespass, the rule as stated

above is the law of damages, both in England and in this country, though in some of the State courts the milder rule has been applied even to this class of cases. Such are some that are cited from Wisconsin. Single vs. Schneider, 24 Wis., 299; Weymouth vs. R. R. Co., 17 Wis. 550.

"On the other hand, the weight of authority, in this country as well as in England, favors the doctrines that, where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern, or if the conversion sued for was after value had been added to it by the work of the defendant, he should be credited with this addition."

While the words "willfully and knowingly" sometimes denote only that the person knows what he is doing and acts of his own volition, yet generally they signify an evil intent.

The courts have defined the terms used, as follows:

"Doing or omitting to do a thing knowingly and wilfully, implies not only knowledge of the thing, but a determination with a bad intent to do it, or to omit doing it. 'The word *willfully*,' says Chief Justice Shaw, 'in the ordinary sense in which it is used in the statutes, means not merely *voluntarily*, but with a bad purpose.' Com. vs. Kneeland, 20 Pick., 220.

" 'It is frequently understood,' says Bishop, 'as signifying an evil intent without justifiable excuse.' Cr. L. Vol. 1, Sec. 428. Felton vs. U. S. 96 U. S. 699, 24 L. Ed. 875. Cited and approved in Potter vs. U. S. 155 U. S. 438; 39 L. Ed. 214.

A wilful act is one committed with an evil intent,

with a legal malice, without reasonable ground for believing the act to be lawful, and without legal justification.

Bowers vs. State, 24 Tex. App. 542.
R. R. Co. vs. Nash. (Ind.) 24 N. E. Rep. 884.
State vs. Preston, 34 Wis. 682.

The last case contains an excellent discussion with numerous citations.

The rule we contend for is well expressed by the Supreme Court of New York:

> "The measure of damages for cutting and taking away trees, when done in good faith, under claim of title, is the value of the trees as standing timber, and not their value as augmented by defendant's labor in converting them into logs."

Clark vs. Holdridge, 43 N. Y. S. 115.
12 App. Div. 613.

Winchester vs. Craig 33 Mich., 205, is a well considered case. The syllabus is in part as follows:

> "Marston, J. with whom Cooley, Ch. J. concurred, holding, that in the absence of *fraud*, *violence*, or *wilful negligence* or *wrong*, the proper measure of damages generally in trover, as in other like actions, is such a sum as will afford compensation for the actual injury sustained."

In the course of the discussion the Court says:

> "There is another class of cases where the doctrine which the plaintiff seeks to have applied would work gross injustice: a person honestly and in good faith obtains posses-

sion of some young animal; he may have purchased it from some person supposed to have a good title to it, but who in fact did not; or *he may have purchased it at a judicial sale, where, on account of some technical defect, the title did not pass;* or it may be through a case of mistaken identity, he has claimed to be the owner, whereas, in truth and fact he was not. He retains possession, feeding and taking care of the animal until it became full grown and immensely more valuable. * * * The original owner having at length discovered his property, demands possession, which being refused, he brings trover to recover the value. Now most assuredly in any of these cases, the extent of the injury which the plaintiff sustained would not be the then value of the animal. He has not fed it, taken care of it, or run any of the risks incidental to the raising of stock. All this has been done by another. Why then should the result of the labor, care and expense of another just be given to him?"

"In this case each has an interest in the logs; the plaintiff as the assignee of the original owner; the defendant by, in good faith, largely increasing their value. Each should be protected in his rights, and thus as nearly as possible, substantial justice will be done. To allow plaintiff to recover what he here seeks would be to break down all distinctions between the wilful and the involuntary trespasser; a distinction which is based upon sound legal principles, and which is applied in all other forms of action."

"Where defendant's conduct, measured by the standard of ordinary morality and care, which is the standard of the law, is not chargeable with fraud, violence, or wilful negligence or wrong, the value of the property taken and converted is the measure of just compensation. * * * *

> "Where there is no wrongful purpose or wrongful negligence in the defendant, compensation for the real injury done is the purpose of all remedies."
>
> Forsyth vs. Wells, 41, Pa. St., 291.

In Baker vs. Drake, 53 N. Y., 211; Markham vs. Jaudon, (41 N. Y., 235), which laid down the harsher rule of damages, is expressly overruled.

One of the syllabi is:

> "The rule of damages in civil actions does not depend upon the form of action. Whether it be in contract or tort, the proper measure of damages, except where punitive damages are allowable, is a just indemnity to the party injured, for the loss which is the natural, reasonable, and proximate result of the wrongful act complained of, and which a proper degree of prudence, on the part of the complainant, would not have averted."

In Heard vs. James, 49 Miss., 236, one of the syllabi is:

> "The rule for the measure of damages for the wrongful taking or detention of property is to be determined by the animus of the conversion. If the act was in good faith upon some supposed right of claim or error, the measure will be the value of the property at the time it was taken; but if the taking or conversion be characterized by malice or oppression, damages may be punitive, and in an action for its recovery no allowance will be made the defendant for any increased value that may be bestowed by skill and labor on the property."

Gaskins vs. Davis, (N. C.) 25 L. R. A. 813, is an instructive case. We quote:

"The weight of authority, it must be conceded, sustains the rule, that where the action is brought for damages for logs cut and removed in the honest belief on the part of the trespasser that he had title to them, the measure of damages is the value in the woods from which they were taken, with the amount of injury incident to removal, not at the mill where they were carried to be sawed. Tilden vs. Johnson, 52 Vt. 628, 36 Am. Rep. 769, and note, 770; Herdic vs. Young, 55 Pa. 176, 93 Am. Dec. 739; Hill vs. Canfield, 56 Pa., 454; Moody vs. Whitney, 38 Me. 174, 61 Am. Dec., 239; Cushing vs. Longfellow, 26 Me.. 306; Goller vs. Fett, 30 Cal., 482; Foote vs. Merrill, 54 N. H., 494, 20 Am. Rep., 151; Lake Shore & M. S. R. Co. vs. Hutchins, 32 Ohio St., 581.

"In the absence of any evidence that would justify the assessment of vindictive damages, there is only one exception to the rule as we have stated it, and that is, where the trees destroyed are not the ordinary timber of the forest, but are peculiarly valuable for ornament, or as shade trees."

In United States vs. N. P. R. Co. et al., 67 Feb. 890, the mistake was purely an error in law; no mistake of fact was involved. The syllabus is:

"The N. Ry Co. cut certain timber on lands which were, in good faith, supposed to be included in a grant to it, and caused the same to be manufactured into lumber. In an action against the railway company for trespass, it was afterwards adjudged that the land on which the timber was cut was public land. Held that, the trespass having been unintentional, the true measure of damages was the value of the standing timber at the time it was cut, and not that of the manufactured lumber after increased value had been added by the defendant's la-

bor. Wooden-ware Co. vs. U. S., 1 Sup. Ct. 398, 106 U. S. 434, followed.

The court in conclusion says:

"The Supreme Court, in Wooden-ware vs. U. S. 106 U. S. 434, 1 Sup. Ct. 398, has declared the doctrine that 'where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern.' This case comes clearly in the rule thus defined. It was the general belief at the time the timber was cut that the land in question was within the grant to the Northern Pacific Railroad Company of July 2, 1864, and that the date of said grant was anterior to that of the Oregon Central Railroad Company. Judge Sawyer so held in this case, in the judgment which was reviewed on writ of error from the Supreme Court. There can be no doubt that the defendant honestly believed that the title to the land had passed to the Northern Pacific Railroad Company, and that it was no longer public land. The testimony shows that the value of the standing timber at the time it was cut was about seventy-five cents a thousand feet, and it is the judgment of the court that the entry of judgment heretofore made in said cause in favor of the United States for $2,095 be set aside, and that judgment be entered in favor of the United States against the defendants for the sum of $220 and costs."

See also Sedgwick on Damages, 8th Ed., pars. 503, 504.

The case of the United States vs. Murphy, cited by plaintiff in error, in the Circuit Court of Appeals, is, we submit, not in point. That was a criminal prosecution, for the violation of a positive statutory law, providing a penalty regardless of the intent of the

trespasser: no such law is involved in the consideration of this case.

We respectfully submit that defendant had a right to cut the timber; and that if it made a mistake, it still acted in good faith and reasonably, and that therefore the measure of damages if liable at all, is "stumpage" value.

Respectfully submitted,

P. L. WILLIAMS,

Attorney for Defendant in Error.

Supreme Court of the United States.

No. 147.—October Term, 1903.

The United States, Plaintiff in Error, vs. The St. Anthony Railroad Company. } In error to the United States Circuit Court of Appeals for the Ninth Circuit.

[February 23, 1904.]

This action was brought by the United States against the railroad company to recover damages for the unlawful cutting down and conversion by the company, in the year 1899, of certain timber on the public lands belonging to the United States in the State of Idaho. The value of the timber thus cut was, as alleged, over $20,000. The trial was had in the Circuit Court of the United States for the District of Idaho, Southern Division, and resulted in a judgment dismissing the complaint, which was affirmed, upon appeal, by the Circuit Court of Appeals, Ninth Circuit, (114 Fed. Rep. 722,) and the government has appealed to this court.

The defendant answered the complaint and denied its averments as to unlawfully entering upon the lands and cutting the timber. As a further and separate defense the defendant averred that it was duly incorporated on May 18, 1899, under and pursuant to the laws of the State of Idaho, for the purpose of constructing and operating a railroad from the town of Idaho Falls in Bingham County, Idaho, to St. Anthony in Fremont County, in that State, a distance of approximately forty miles. On or about July 7, 1899, the board of directors duly adopted the route for the railway, which was practically a straight line between the town of Idaho Falls and the town of St. Anthony, and passed through and over the public lands of the United States. The defendant fully performed all things required by railroad companies by the act of Congress granting to railroads the right of way through the public lands of the United States, approved March 3, 1875, and it thereby became entitled to the benefit of the privileges therein granted to railroad companies. For the purpose of procuring the necessary material with which to construct its railroad, the defendant, through its authorized agents, entered upon the lands described in the complaint, which were, as defendant alleged, adjacent to the line of the railroad, for the purpose of procuring ties and timbers for the construction of the road, and did during the summer and fall of 1899 cut and remove timber growing on the lands, not to exceed 1,682,975 feet; that the ties and timbers were cut from the nearest public lands to said line of road, and were, as the defendant averred, adjacent thereto; that all of the ties and timbers were necessary for the original construction of

the road, and were used for that purpose, and the defendant cut and removed the timber in good faith, with no intention of violating any law or committing any trespass, but believing that it had the right to enter upon the lands and take the timber.

For the purpose of the trial there was an agreed statement of facts made, and therein it was stated that the cutting of the timber was upon the lands of the government and the amount thereof was correctly stated in the answer, and its value upon delivery to the defendant was as alleged in the complaint.

The defendant did not act under any mistake of fact in regard to the status of the timber and the lands upon which it grew, and did what was done, believing it had the legal right so to do. It is not disputed that the lands were unoccupied, unentered public lands of the United States.

Upon the question whether the lands where the timber was cut were or were not adjacent, it was agreed:

"That said lands from the place where said timber was cut to the line of the road were and are the following distances, namely: from 17 to 23 miles by air line; from 20 miles to 25 miles by wagon road, and from 22 to 26 miles following the sinuosities of the river upon which said timber was in part conveyed. By far the larger part of the timber was driven or rafted down said river from said lands to said railroad, the other part being hauled by wagon. The wagon road referred to and so used is an ordinarily good road and involves no unusual grades, and said timber could with reasonable profit be hauled by wagon from the place where it was cut to said railroad, where it was used for ties and in the construction of bridges. It is further agreed that there were no other timber lands or suitable timber upon either side of said railroad as near as were the land and timber in question, and that said lands are near enough and so located with reference to said railroad as to be directly and materially benefited thereby."

The statute under which the cutting is justified is section 1 of "An act granting to railroads the right of way through the public lands of the United States," approved March 3, 1875, (18 Stat. 482; 2 Comp. Stat. 1658,) and is set forth in the margin.*

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* *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station buildings, depots, machine shops, sidetracks, turnouts, and water stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road.

Mr. Justice PECKHAM, after making the foregoing statement, delivered the opinion of the Court.

The important question in this case is as to the meaning of the term "adjacent" when used in the first section of the statute of 1875. The act is a general one, and is therefore applicable to no particular road, except as the facts in each case may bring the road within its language. It grants the right of way through the public lands in the United States upon conditions named, to the extent of 100 feet on each side of the central line of the road. The lands from which materials for the construction of the railroad may be taken must be adjacent to this piece of land but two hundred feet wide. The term is a somewhat relative and uncertain one, and in one aspect the case may be determined with at least some reference to the size of the strip or right of way granted, and to which the land must be adjacent. It may also be remembered that the whole length of the road is but forty miles. In some views of the case the narrowness and shortness of the line might have some effect upon the question of the distance to which the word adjacent might carry one in the search for timber. As the word is frequently uncertain and relative as to its meaning, it might naturally perhaps be regarded as more extended when used with reference to a large object than with reference to a comparatively small one. In other words, it must be defined with reference to the context, at least to some extent.

We are not disposed to unduly limit the meaning of the word as used in the statute so as to exclude lands which might otherwise fairly be regarded as within its purpose and thereby defeat the intent of Congress. The act is not to be construed in an unnecessarily narrow manner, nor at the same time should the construction of its language be extraordinarily enlarged in order to attain some special and particular end. In *United States* v. *Denver &c. Railway*, (150 U. S. 1,) another question arose under this same section, and the construction of the act in that regard was certainly as liberal as its language would warrant. It was there held that a railroad company had the right to cut and take the timber or material from public lands adjacent to the line of the road and use the same on portions of its line remote from the place from which it was taken.

In speaking of the proper construction of the act, it was said by Mr. Justice Jackson, for the court:

"It is undoubtedly, as urged by the plaintiffs in error, the well-settled rule of this court that public grants are construed strictly against the grantees, but they are not to be so construed as to defeat the intent of the legislature, or to withhold what is given either expressly or by necessary or fair implication. In *Winona & St. Peter Railroad* v. *Barney*, (113 U. S. 618, 625,) Mr. Justice Field, speaking for the court, thus states the

rule upon this subject: 'The acts making the grants . . . are to receive such a construction as will carry out the intent of Congress, however difficult it might be to give full effect to the language used if the grants were by instruments of private conveyance. To ascertain that intent we must look to the condition of the country when the acts were passed, as well as to the purposes declared on their face, and read all parts of them together.'

"Looking to the condition of the country, and the purposes intended to be accomplished by the act, this language of the court furnishes the proper rule of construction of the act of 1875. When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. (*Bradley* v. *New York & New Haven Railroad*, 21 Ct. 294; Pierce on Railroads, 491.)

"This is the rule, we think, properly applicable to the construction of the act of 1875, rather than the more strict rule of construction adopted in the case of purely private grants; and in view of this character of the act, we are of opinion that the benefits intended for the construction of the railroad, in permitting the use of timber or other material, should be extended to and include the structures mentioned in the act as a part of such railroad."

It was also said that the railroad should be treated "as an entirety, in the construction of which it was the purpose of Congress to aid by conferring upon any railway company, entitled to the benefits of the act, the right to take the timber necessary for such construction from the public lands adjacent to the line of the road. This intention would be narrowed, if not defeated, if it were held that the timber, which the railway company had the right to take for use in the construction of its line, could be rightfully used only upon such portions of the line as might be contiguous to the place from which the timber was taken. If Congress had intended to impose any such restriction upon the use of timber or other material taken from adjacent public lands, it should have been so expressed. No rule of interpretation requires this court to so construe the act as to confine the use of timber that may be taken from a proper place for the purpose of construction to any particular or defined portion of the railroad. To do this would require the court to read into the statute the same language, as to the place of use, which is found in the statute as to the place of taking. In other words, it would require the court to interpolate into the statute the provision that the place at which the timber shall be used shall be '*contiguous, adjoining or adjacent*' to the place from which it is taken. The place of *use* is not, by the language of the statute, qualified, restricted

or defined, except to the extent of the construction of the railroad as such, and it is not to be inferred from the restriction or limitation imposed as to the *place* from which it may be rightfully taken that it is to be used only adjacent to such place."

In the above case it was admitted that the lands from which the timber was taken were adjacent to the line of the road within the meaning of the statute.

It is also seen in the extract from the opinion that the word "adjacent" is therein used in connection with the words "contiguous" and "adjoining," so as to give an impression that it is almost, though not entirely, synonymous with those words. And we think this is true. "Contiguous, lying close at hand, near," is the meaning given it by the lexicographers. It need not be adjoining or actually contiguous, but it must be, as said, near or close at hand.

Although a liberal construction of the statute may be proper and desirable, yet the fair meaning of the language used must not be unduly stretched for the purpose of reaching any particular case which, while it might appeal to the court, would yet pretty plainly be beyond the limitation contained in the statute. While not to be construed so as to defeat the intent of the legislature, or to withhold what is given either expressly or by fair implication, it is surely improper to so extend the ordinary and usual meaning of the word as to permit the railroad company to enter upon any land of the government, as being adjacent, simply because the road wants the timber. The statute was not intended to furnish a general license to the company to enter upon any public land and to range to any extent thereon for timber for its road. In all cases it must be adjacent.

In the lower Federal courts there have been some cases in which the question of the proper construction of this section of the act of Congress received attention. In *United States* v. *Denver & Rio Grande Company*, (31 Fed. Rep. 886,) that land was regarded as adjacent which could be reached by ordinary transportation by wagons. The parties in that case agreed that the timber was cut from lands adjacent to the line of railway, and the question was whether timber thus cut could be taken from lands adjacent to the line of road and used on any part of the line. But the meaning of the word was referred to in the opinion, and it was stated that it depended very much upon the context and the subject matter to which it should be applied for its proper effect; that with reference to the lands which might be taken for stations, sidetracks, &c., the word "adjacent" was used in the same sense of "contiguous" or "adjoining," while with reference to material for building the road the word should have the larger significance of nearness without actual contact. It was said to be unreasonable to limit the meaning of the word to the government subdivisions lying next to the right of way, and it was said that the meaning of the term "adjacent" probably included the right to take timber from

public lands within ordinary transportation by wagon. This meaning was arrived at because the company could thus avail itself of all timber which could be so transported with a profit to the company, while excluding other lands from which transportation with profit could not be thus effected. We are not satisfied of the correctness of this construction or of its reasonableness. Lands might in this way be found adjacent which were fifty or a hundred or more miles away, and which could not be regarded as adjacent within any meaning of that word heretofore given, and could only be said to be adjacent in order to serve an exigency and to allow a railroad to procure timber gratuitously from the government. The purpose may, perhaps, be good, but the meaning cannot be stretched too far, even to accomplish a possibly desirable end.

Again, in *United States* v. *Chaplin*, (31 Fed. Rep. 890,) it was held, in the Circuit Court, District of Oregon, that land was adjacent to the line of road within the purpose and intent of the act when, by reason of its proximity thereto, it is directly and materially benefited by the construction of such road. The court said in that case:

"What is 'adjacent' land within the meaning of the statute must depend on the circumstances of each particular case. Where the 'adjacent' ends and the non-adjacent begins may be difficult to determine. On the theory that the material is taken on account of the benefit resulting to the land from the construction of the road, my impression is that the term 'adjacent' ought not to be construed to include any land save such as by its proximity to the line of the road is directly and materially benefited by its construction."

We fail to see the correctness of this rule. Lands hundreds of miles distant might be directly and materially benefited by the construction of a railroad, and yet be far beyond the utmost extent heretofore supposed to be included by the word adjacent. To give this extended meaning to the word is, as it seems to us, merely to say that Congress might have included lands for that reason if it had so chosen, and, therefore, it is well enough to enlarge the ordinary meaning of the word to accomplish a purpose not plainly stated, but only guessed at.

In *Denver &c. Railroad* v. *United States*, (34 Fed. Rep. 838,) while the question as to what were adjacent lands was not in issue, as the fourth paragraph in the agreed statement of facts stipulated that the lands from which the timber was cut were adjacent to the line of railway, yet Mr. Justice Brewer, then Circuit Judge, in his opinion said that he did not agree with the idea that the proximity of the lands was immaterial, or that Congress intended to grant anything like a general right to take timber from public lands where it was most convenient. He said that while the grant was limited to adjacent lands, he did not appreciate the logic which concludes that if there be no timber on adjacent lands, the grant reaches out and justifies taking the timber from distant lands fifty

or a hundred miles away. The real question in the case was whether timber taken from land which was adjacent could be taken to any portion of the road, no matter how distant from the place of cutting. As it was agreed the timber taken was adjacent, it does not appear how far from the line of the road it was cut. The Circuit Judge, overruling in this respect the District Judge, held the timber could be used all along the line of the road. This is the same view subsequently taken by this court in 150 U. S. *supra.*

In *Bacheldor* v. *United States,* (83 Fed. Rep. 986,) it was held by the Circuit Court of Appeals that under the act of June 8, 1872, (17 Stat. 339,)which uses language similar to the section in question, the cutting of timber 25 miles from the road was not, as matter of law, unlawful. The question whether the lands were adjacent was held to be a mixed question of law and fact, and the test of illegality was whether the timber was within reasonable hauling distance by wagons. The judgment of the court below (48 Pac. Rep. 310) was therefore reversed.

In *Stone* v. *United States,* (64 Fed. Rep. 667,) it was held that the act in question did not authorize the taking of timber for the construction of a road from public lands, which were 50 miles distant from the end of the road. That case was affirmed in this court. (167 U. S. 178.) The trial court had charged the jury that, under the act of 1875, the term "adjacent lands" means lands in proximity, contiguous to, or near to the road, and that lands so far distant from the railroad as lands in Kootenai County, Idaho, where it is claimed that the railroad ties were cut, were not adjaceut lands within the meaning of the law. This court concurred with the Circuit Court of Appeals in adjudging the charge to be a sound interpretation of the act.

The report in the Stone case showed, as stated in the opinion of the Circuit Court of Appeals, that no timber fit for its use was found along the line of either of the railroads, that both of them penetrated a barren region, almost entirely destitute of timber, and that timber was cut from the lands along the line of the Northern Pacific Railroad about fifty miles distant from the eastern end of the other roads, which was the nearest point where available timber could be had.

We thus have the authority of this court that lands which are adjacent within the meaning of this act of 1875 must be lands in proximity, contiguous or near to, the line of the road. While "proximity" or "nearness" to an object is somewhat uncertain as a measure of distance, yet the use of such words as a definition, brings to the mind the idea that lands which are in fact far off, or distant, are not adjacent. And the question is, whether lands which are twenty miles off can reasonably be described as in proximity or near to a line of road a couple of hundred feet wide.

In our belief no one in describing the locality of such lands would say they were adjacent to the railroad.

The above cited cases show a conflict in the minds of the Federal judges, as to what are the material facts upon which to base an answer to the question, when are lands adjacent within the meaning of this statute. "Adjacent," we admit, is a relative term, and sometimes may depend for its proper application upon the facts in the particular case.

The matter of the construction of this language was the subject of a letter from Mr. Vilas, who was then Secretary of the Interior, to the Attorney General, dated January 10, 1889, after the decision of the cases in 31 Fed. Rep. *supra*. The Secretary was of the opinion that while nothing in the term "adjacent," as used in the statute, rendered it necessary to imply that the lines of survey should be resorted to to define its extent, there was at the same time nothing in this indefiniteness which, in his opinion, could authorize the view that timber or other material could be taken from public lands so far away as may be reached by wagon transportation in a single day, or any other given period of time. He thought that the use of the word "adjacent" intended and meant the right to the public lands which were *conveniently contiguous to the right of way and immediately accessible from it*, and he did not believe that it was the purpose of Congress or that his department ought to decide that the railroad company could range the public lands to secure material for the construction of the road, when it did not happen to exist on those lands which, in the ordinary acceptance of the phrase, would be regarded as adjacent to the right of way. Taking into consideration the whole case, the Secretary was of opinion that it was—

"As far as sound discretion will warrant executive officers to go until an authoritative decision by the courts, to hold that, under this phrase, material may be taken from the tier of sections through which the right of way extends, as immediately adjoining the right of way, and perhaps an additional tier of sections on either side, as within the idea of 'adjacency. . . . In view of all the facts and considerations applicable, it is believed the definition and rule given are fair and just, and legitimately to be adopted. I think it wiser and safer to pursue such a rule, subject as it is to review by the courts, than to leave the matter open to the varying notions of different officers or the necessities of the companies."

There is in our judgment much to be said in favor of this view of the statute. It falls in with the general system adopted by the United States for the survey of its public lands. Those sections touching the line of the road would of course be included within the term, while those next to them might also be included, because, although not touching, they would be near to such line, and would, therefore, come within any definition of the term as being close or near to the line without being contiguous to or

actually touching it. It is not at all unreasonable to say that very probably Congress had in mind this general system of division of the public lands, and that the word "adjacent" would properly be interpreted with respect thereto. If the word "adjoining" had been used instead of "adjacent," those sections touching the line of the road could be regarded as the adjoining lands, and when the word "adjacent" instead of "adjoining" is used, it might, not unnaturally, be said to include the next tier of sections away from the line of the road. We do not think that sections still further removed could under this rule be regarded as adjacent. The rule also gives certainty and definiteness to an otherwise somewhat doubtful expression, and, as the Secretary says, prevents the companies from ranging the public lands to secure material for the construction of their roads, and thus raising questions of legality in cutting in almost every case where the lands were beyond the sections described by the Secretary. This alone is an important consideration.

If not bounded by section lines, the term "adjacent" becomes of more or less uncertain meaning. We cannot, however, conclude that within any fair construction of the statute, these lands were in any event adjacent to the line of the road. The word is also used in the same section, when speaking of the use of ground adjacent to the right of way for purposes of depots, machine shops, &c. In such use it is clear the word is greatly limited. We take it there is a limit beyond which lands could not be described as adjacent to the line of the railroad, even if they were benefited by its construction and were the nearest public lands upon which timber could be found and the timber thereon could be transported by wagon with profit to the company. Lands which are twenty miles off we cannot regard as adjacent to the line of a railroad within the meaning of this statute. On the other hand, lands within two miles, we assume all would agree, are so adjacent. Now, at what point between these two extremes lands are on one side adjacent and on the other not adjacent, is a very difficult matter to decide. It is necessarily somewhat vague and uncertain, and we are not called upon to determine it in this case. All we have to do now is to declare that lands as far off as the lands in question are not adjacent lands, and it is unnecessary to say at what point on the intervening lands adjacency begins. It is very difficult to determine just where twilight ends and night begins, but it is easy enough to distinguish noon from midnight. If we say that two miles would be within the term and twenty would be beyond it, it might be asked why nineteen miles would not also be beyond it, or three miles be within it, and these questions might puzzle one to answer. It can only be said that a distance of twenty miles is beyond it any way and two miles would be within it. If, then, short distances be proposed and an answer requested as to whether they

are or are not within or without the limit, each division might be so small that no clear and decided difference could be asserted between it and the land immediately adjoining, and so it might result in no difference being stated between two and twenty, and yet we know there is a division and it lies somewhere between those two points. The nearer an approach is made to a junction between what is stated to be the adjacent and the non-adjacent lands, the more difficult it becomes to show any difference warranting a different decision, and yet, as we have said, there is a point at which there can be no doubt. We think twenty miles is certainly beyond any fair distance in which lands could be said to be adjacent to the line of this road. And we say this while fully recognizing and keeping in mind the liberal rule of construction set forth by this court in the *Denver Railroad case*, (150 U. S.) *supra*. We appreciate the fact that the act was passed to "secure public advantages and to subserve the public interests," but nevertheless it does not grant free license to roam the public lands and take timber wherever thereon it may be found, or wherever by possibility it might be taken with profit to the company. The statute says that the lands must be adjacent, and there must of necessity therefore be a point where the lands are not adjacent, even though the timber might be removed therefrom with some possible profit to the company. As Congress has not given the definition of adjacent, such as has been adopted by any of the lower courts, we cannot, even by a so-called liberal construction, enlarge the ordinary meaning of the word to the extent made necessary in order to justify this cutting.

We cannot take, for the reasons already stated, the fact of wagon road transportation, as a means of deciding whether the lands are or are not adjacent, for it seems to us that it may lead us far beyond any reasonable limit to the word. The same may be said as to the benefits to the land by the building of the road. That also would in many cases lead too far from the line. In this case most of the transportation was done by water, the timber being driven or rafted down the river, and in that way the distance was from twenty-two to twenty-six miles, although such timber might have been hauled by wagon with reasonable profit. Now, suppose the nearest timber lands of the government were a hundred miles away, but by reason of water communication the timber could be floated down to the line of the road "with reasonable profit," would such lands then be adjacent? We think clearly not. And it is because of the fact that the distance would be plainly too great to conform to any of the meanings which have heretofore been given to the word. It strikes one so at first blush. We are of opinion that the same ought to be said of these lands. They are not adjacent, for they are not near;, they are not in close proximity to this strip of land two hundred feet wide. This ordinary

limitation of the meaning of the word should not be enlarged for the purpose of thereby embracing lands which otherwise would not come within any fair construction of the statute.

The further question is as to the time when the value of the timber is to be ascertained.

The parties agreed that the amount of the timber growing on the lands is correctly stated in the answer, and the value thereof at the place where the timber was cut was $1.50 per thousand feet and the value upon delivery to the defendant was $12.35 per thousand feet. The delivery to the defendant was made by the Thompson Mercantile Company, with which the railroad company had entered into a contract to be supplied with the necessary ties and timbers for the construction of its road, and in such contract the mercantile company was, by the expressed terms thereof, appointed the agent of the defendant, and in that capacity it was authorized by the defendant to cut timber for the purpose mentioned. The mercantile company did cut the timber on the lands, which it in good faith supposed were adjacent to the line of the railroad, and delivered such timber to the railroad company upon the line of its road. We think the measure of damages should be the value of the timber after it was cut at the place where it was cut. The defendant does not, in our judgment, come within either the case of *Wooden Ware Company* v. *United States*, (106 U. S. 432,) or that of *Pine River Logging Company* v. *United States*, (186 Id. 279.) In both of those cases the parties doing the cutting did it willfully and in bad faith. In the Wooden Ware case the timber was sold by the original trespasser to a third party without notice of the trespass, and the party purchasing was guilty of no willful wrong. It was, however, held that the defendant, having purchased from the original wrongdoer and willful trespasser, was liable for the value of the timber at the time and place it was purchased by defendant.

In the Pine River Logging case, the parties to the contract were held liable for the full value of the timber after it was cut and had increased in value by reason of the labor expended upon it by the parties who did the cutting. This was on the ground that they were willful trespassers, acting in bad faith, and ought to be made to suffer some punishment for their depredations; but it was stated that where the trespass is the result of inadvertence or mistake, and the wrong was not intentional, the value of the property when first taken must govern.

Although in this case it is agreed that the defendant did not act under a mistake, meaning thereby that the facts touching the status of the timber and the lands where the timber was cut were known, yet what was done was in the belief by the defendant that the lands were adjacent to the line of the road and that the cutting was legal. It was done upon

the advice of counsel, and the defendant used ordinary care and prudence in first being advised as to the law upon the facts as they have been agreed upon, and there was no intention on the part of the defendant to violate any law or to do any wrongful act. This, we think, clearly takes the case out of the principle of those above cited, and the measure of damages must, therefore, be the value of the timber at the time and at the place where it was cut.

The judgment must be reversed, and the case remanded to the Circuit Court for the District of Idaho, Southern Division, with directions to enter judgment in favor of the United States for the amount of the timber as stated in the answer, and for its value at the rate of $1.50 per thousand feet.

So ordered.

True copy.

Test:

Clerk Supreme Court, U. S.